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Supreme Court of the United States

October Term, 2001

FORD MOTOR COMPANY,

Petitioner,

v.

KATHLEEN MADALINE JARVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

This case arises in the context of a confusing and unsettled area of federal law, to wit, the correct procedures to be followed by courts and parties in the event that a jury renders an inconsistent verdict. It is an area of practice where the application of the Federal Rules of Civil Procedure, such as Rules 46, 49(a), 49(b) and 51, varies from circuit to circuit, and within circuits, sometimes with dire consequences. It is in that context that the following questions are presented.

1. Whether it was error for the circuit court, in violation of the Seventh Amendment's guarantee of the right to trial by jury, and in conflict with decisions of other federal courts of appeals, to set aside and refuse to give effect to the jury's verdict that the Ford Aerostar was not defective, based solely on a contradictory jury finding that Ford was negligent and on the circuit court's determination that the jury *could have* reached a finding of defect?

2. Whether it was error for the circuit court, in violation of the Seventh Amendment, the Due Process Clause of the Fourteenth Amendment and in direct conflict with decisions of other federal courts of appeals and the language of the Federal Rules of Civil Procedure, to find that Ford had waived its right to seek relief on the basis of an inconsistent verdict, where it is undisputed that Ford complied with all of the requirements of Fed.R.Civ.P. 49 and the district court found that Ford had in fact preserved its right to challenge the inconsistent verdict?

RULE 29.6 STATEMENT

Petitioner Ford Motor Company has no parent company. No company, subsidiary, or conglomerate affiliate owns 10% or more of Ford Motor Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-73a) is reported at 283 F.3d 33. The opinion of the district court (App., *infra*, 74a-127a) is reported at 69 F.Supp. 2d 582.

JURISDICTION

The court of appeals' judgment was entered on February 7, 2002. A timely petition for reargument was denied on June 13, 2002. App., *infra,* 128a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh and Fourteenth Amendments of the United States Constitution and Federal Rules of Civil Procedure 46, 49 and 51. The text of these authorities is set forth in the appendix at 130a, *et seq*.

STATEMENT OF THE CASE

A. Introduction.

This case presents the Court with the opportunity to resolve a long festering conflict among the courts of appeals, not only as to proper procedures to be followed by district courts and parties in the event that a jury renders an inconsistent verdict, but also as to the appropriate relief to be granted in

such cases. It also gives the Court a vehicle by which to insure that a number of the Federal Rules of Civil Procedure ("federal rules") are applied and interpreted in a uniform and consistent manner throughout the federal court system, so that they are not used as a means of encroaching upon a litigant's right to trial by jury.

Although the use of special questions or interrogatories pursuant to Fed.R.Civ.P. 49 ("Rule 49") was intended to enhance and protect the right to trial by jury by bringing clarity to jury verdicts, the opposite has occurred. Such wide ranging conflict has developed among the circuits as to the appropriate procedures to be followed by the parties in the event of an inconsistent verdict, as well as with regard to the appropriate remedy to be applied by district courts, that the use of special verdicts has become perilous, a trap for courts and counsel alike, implicating constitutional safeguards.

This case is an example in the extreme of the minefield which Rule 49 has become because of its inconsistent application by the circuit courts. At the conclusion of this products liability trial the jury found that the vehicle was not defectively designed. According to the jury instructions the "no defect" finding precluded a finding of negligence. Nevertheless, the jury also found that Ford Motor Company ("Ford"), negligently designed the vehicle. Faced with this clear conflict, the second circuit, in a blatant violation of the Seventh Amendment, rendered the jury verdict of "no defect" a nullity, of no force and effect. It reached this conclusion despite the fact that Ford reasonably relied on the provisions of Rule 49 to determine the proper procedures to protect its rights in the event of an inconsistent verdict; that Ford complied with all of the requirements of Rule 49; and that the district court found that Ford properly preserved its objection to the inconsistent verdict before the jury was discharged. Instead of enforcing the federal rules as written, the circuit court, in a decision which further deepens the already existing conflict in this area, *sua*

sponte superimposed the requirements of Fed.R.Civ.P. 51 ("Rule 51") on cases heretofore governed by Rule 49 and invoked a purported waiver by defendant's counsel. This erroneous and retrospectively-applied technicality elevated form over substance and was a clear violation of Ford's fundamental due process rights. It should not be permitted to stand.

B. Proceedings in the Trial Court.

1. The Evidence.

Plaintiff alleged she was injured in a single vehicle accident caused by an alleged design defect in the cruise control system of the Ford Aerostar she was driving. App., *infra,* 2a-3a. According to plaintiff this alleged defect caused the car to suddenly accelerate without driver input. *Id.* 4a. It was Ford's position at trial that the accident occurred as a result of plaintiff's inadvertent application of the accelerator when she thought she was applying the brakes. *Id.* 29a-30a. In her complaint plaintiff asserted claims of design defect premised on both allegations of strict products liability and negligent design. However, all of the evidence presented at trial revolved around the alleged defect in design; no independent evidence of negligence was presented to the jury. *Id.* 19a-29a; 84a.

Although thoroughly inspected after the accident, no physical evidence of a defect in the automobile was found. Instead, plaintiff presented an expert who opined that the simultaneous occurrence of two "transient" electrical events could result in sudden acceleration which would not be overcome by application of the brake system. *Id.* 22a-25a. In opposition, Ford presented evidence demonstrating that its braking system, if properly applied, would have stopped the vehicle from suddenly accelerating even in the event that the purported, hypothesized, simultaneous electrical faults did occur. Indeed, the brake system was designed so that if plaintiff had one foot firmly on the brake and the other foot on the gas

pedal the engine would rev but the car would not move. Full application of brakes overwhelms acceleration. *Id.* 117a-118a. In addition, Ford presented evidence that the National Highway Traffic Safety Administration ("NHTSA"), after conducting two extensive studies on alleged sudden acceleration, concluded that in all unintended sudden acceleration cases where there is no physical evidence of a defect, the reported event was most probably the result of driver error. *Id.* 118a-122a. Indeed, the jury here found a substantial percentage of causal fault by plaintiff *Id.* 72a.

2. Negligence and Strict Products Liability.

At a pre-trial conference the parties and the court discussed whether, as a matter of state substantive law, plaintiff could present both a strict liability and a negligent design claim to the jury. The district court concluded that plaintiff could do so. *Id.* 85a-86a. That determination was based on the historical development of strict products liability which evolved as a means by which parties injured by defective products could more easily recover from the manufacturer merely by proving that a product was defective without having to meet the heavier burden of proving knowledge or negligence on the part of the manufacturer or seller. Nevertheless, strict liability has not been deemed a substitute for a negligence action, and the right to bring a negligence action has not been abrogated. Accordingly, plaintiffs are generally permitted to proceed with both claims. However, except for very limited circumstances, such as cases involving a viable, separate failure to warn claim, a negligence claim can only succeed if plaintiff proves that the product was defective.

This was in fact the manner in which both plaintiff's theories were presented for jury resolution. In its instructions regarding the negligence claim, the court made clear that "if, however, you find that the product was not defective when put on the market by Ford . . . . you will find that Ford was not

negligent." The jury was then asked to answer a series of questions on a form entitled, "special verdict questions" (pursuant to Rule 49), including whether the product was defective and whether Ford was negligent. The jury, rejected the evidence of defect propounded by plaintiff, and found that the design of the Ford Aerostar was not defective. Nevertheless, in complete disregard of the court's instructions, the jury also found that Ford was negligent in its design of the vehicle. The jury further found that plaintiff was 35% contributorily negligent. *Id.* 69a-73a.

3. The Inconsistent Verdict.

Ford immediately brought the inconsistent verdict to the district court's attention, even asking that the jury not be discharged. *Id.* 84a. Because of the confused and unsettled nature of the law in this area, the court then requested that the parties file briefs indicating the appropriate procedure to be followed in the event of an inconsistent verdict. Motion practice ensued in which Ford sought either a new trial based on the inconsistent verdict or, in the alternative, judgment as a matter of law in its favor.

The district court, after reviewing the substantive law of products liability determined that the verdict was indeed inconsistent. *Id.* 78a-84a. In reaching this conclusion, the district court noted but did not resolve the conflict existing among the circuit courts and within the second circuit regarding the proper procedure to be followed in the event of an inconsistent verdict, i.e., whether the objection must be made before the jury begins deliberations or can be made after the verdict is rendered. Instead, the district court found that "even assuming plaintiff's interpretation of the law is correct, defense counsel's failure to object cannot constitute a waiver because we clearly ruled in a pretrial conference that we intended to charge both negligence and strict liability. . . . [Accordingly,] it was reasonable for defendant to conclude that future efforts to

object would be unavailing." *Id.* 84a-85a.

Having recognized the inconsistency in the verdict form's answers, the district court was faced with yet another legal conflict to resolve. Recognizing that circuit courts are split as to whether an inconsistent verdict requires a new trial or entry of a judgment, the district court avoided the issue by deciding Ford's motion for judgment as a matter of law. *Id.* 85a-87a. After reviewing all the evidence, the district court concluded that "a review of the evidence demonstrates that it is completely insufficient to support liability under either a strict liability or a negligence theory and that reasonable and fair minded persons could only have reached a verdict for Ford." *Id.* 108a. Accordingly, it dismissed plaintiff's claim.

C. Proceedings in the Circuit Court.

1. Purported Waiver.

A divided panel of the court of appeals reversed despite a vigorous dissent by Judge Van Graafeiland. The second circuit ignored the absolute discretion granted to district courts to set trial procedure, particularly with regard to the use of special questions, and substituted its discretion for that of the district court. While the second circuit recognized that the district court and the parties all understood that the verdict sheet in this case was prepared in accordance with and governed by the provisions of Rule 49, and that Ford had dutifully complied with the requirements of Rule 49 in order to preserve its objection to the jury's inconsistent verdict, the panel nevertheless determined that Ford failed to preserve the inconsistent verdict issue for review by the circuit court. *Id.* 35a, 38a.

The second circuit, revealing the general confusion which exists as to what constitutes a general verdict and, hence, what constitutes a special verdict, determined that the special verdict questions used by the district court in this case were not

part of a special verdict but rather should be viewed as two separate general verdicts. *Id.* 40a. The panel majority did not explain how one cause of action could yield more than one general verdict, nor did it attempt to distinguish the cases in virtually every other circuit which have deemed verdict sheets precisely like the one at issue here to be special verdicts. It did not expound upon or explain how the remaining five questions on the verdict sheet are to be treated.

The second circuit also failed to grapple with the question of how two inconsistent general verdicts are to be resolved, a subject not covered in the federal rules. Instead, the second circuit determined that Ford (although apparently not plaintiff), should have anticipated that the Rule 49 "special verdict questions" submitted to the jury in this case (App., *infra*, 69a-73a), would be deemed two general verdicts, and brought the potential for inconsistency to the district court's attention as an objection to the charge under Rule 51 before the jury began its deliberations. *Id.* 40a-41a.[1] What is more, contrary to the provisions of Fed.R.Civ.P. 46 ("Rule 46"), the second circuit held that merely alerting the court to the potential conflict was insufficient to preserve the issue. Rather an "explicit, precise, and reasoned objection before the jury deliberated" was required pursuant to Rule 51. *Id.* 38a.

Having thus circumvented the provisions of Rule 49, the rule deemed applicable by the district court and litigants, the second circuit concluded that Ford's objection to the "inconsistent general verdicts" made once the verdict was rendered (but prior to discharge of the jury) was insufficient to preserve an issue for review even when, according to the district

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[1] This of course ignores the fact that the jury instructions specifically precluded the jury from finding negligence if there was no defect, and therefore the charge was not objectionable, as well as the district court's determination that a pre-deliberation objection would have been futile.

court, it was well aware of the potential conflict when it submitted the interrogatories to the jury. The panel majority also rejected the district court's finding that any further attempts to object to the submission of both the negligence and strict products claim would have been futile. *Id.* 49a-50a.

The dissent directly rejected the majority's contention that there could be more than one general verdict in one cause of action and the majority's efforts to extricate this case from Rule 49 so as to bring it *post-hoc* within the confines of Rule 51. *Id.* 57a-63. Judge Van Graafeiland also criticized the majority's violation of the federal rules in failing to temper its technical application of Rule 51 by applying Rule 46, which deems an objection to be properly preserved when the district court is made aware of the party's position. *Id.* 67a.

2. The "No-Defect" Verdict.

Implicitly recognizing that the verdict of negligence could not stand without a finding of defect, the circuit court reviewed the evidence presented at trial, set aside the district court's grant of judgment as a matter of law to Ford and concluded that the "evidence provided the jury with a sufficient evidentiary basis to reasonably conclude that the cruise control mechanism had been *defectively designed*." *Id.* 34a-35a (emphasis added). This, of course, ignored the fact that the jury here reached a verdict to the contrary. Pursuant to the Seventh Amendment, that "no defect" verdict cannot be reexamined or set aside absent a finding that as a matter of law there was no reasonable view of the evidence which could lead a jury to conclude that the Ford Aerostar was *not* defective. Nevertheless, the circuit court rendered the "no defect" verdict a nullity based solely on its conclusion that the evidence was sufficient to raise a question of fact for the jury. This was

error.[2] As noted by the dissent, when faced with two inconsistent verdicts the court cannot simply ignore one or the other; rather, the court must try to reconcile the verdicts or order a new trial.

This case presents a clear example of the conflict that exists among the circuits as to what the correct remedy is when the jury renders an inconsistent verdict. Rather than attempting to reconcile the verdicts or, failing that, remanding the matter for a new trial, the second circuit simply chose to apply *post hoc* a novel procedure, violative of due process of law and, in a clear violation of the Seventh Amendment, used that procedure as a basis for setting aside a jury verdict in Ford's favor.

REASONS FOR GRANTING THE PETITION

One of the purposes of the federal rules was to promote uniformity of practice in all federal courts. Yet, the opposite has resulted in the case of Rule 49, which governs the use of special questions or interrogatories. Initially hailed for the clarity special questions or interrogatories would provide, particularly in the area of products liability litigation, Rule 49 has instead become a trap for litigants, because of its inconsistent application by circuit courts. The conflict as to the requirements that must be met in order to preserve a claim for relief based on an inconsistent verdict runs the gamut from circuits which have interpreted Rule 49 to require no action on the part of litigants to preserve a claim of inconsistent verdict (ninth circuit); to those which require an objection before the

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[2] Under the law of the case embodied in the jury instructions, the jury could not find negligence without finding a defect in design. The "no-defect-in-design" finding of the jury does not vanish whatever the panel majority later concluded regarding sufficiency of evidence presenting a question of fact. Thus the circuit court should not have imposed a judgment on the negligence count. The sole appropriate remedy was to order a new trial.

jury is discharged in Rule 49(b) cases, but not in Rule 49(a) cases (third, fourth, fifth and tenth circuits); to those which seemingly require an objection before the jury is discharged in both Rule 49(a) and Rule 49(b) cases (first, seventh, eighth and eleventh circuits); to those circuits where there is no hard and fast rule and waiver is determined on a case by case basis (second circuit); and now another panel of the second circuit in the instant case which requires that the parties anticipate the mere possibility of an inconsistent verdict and object explicitly pursuant to a totally different rule even before the jury begins to deliberate. As a result of this unsettled state of the law, parties throughout the country have been and are in jeopardy of being deprived of the benefits of a jury verdict in their favor, a clear violation of the Seventh Amendment. They have also been deprived of their due process right to rely on the procedures set forth in the federal rules in order to preserve their rights. This Court should grant review to resolve the circuit conflict and establish a uniform procedure so that parties do not inadvertently waive their constitutional right to have a jury verdict given force and effect.

The failure to give force and effect to a jury verdict has become all too common as circuit and district courts grapple with the issues of the proper procedure to be followed and relief to be granted when, in a complex case, a jury renders an inconsistent verdict. Here, the second circuit directed entry of a judgment based on a verdict which is inconsistent and which cannot be reconciled in plaintiff's favor. It did so not as a matter of law, but simply based on a finding that, in its view, the evidence presented at trial was sufficient to raise a question of fact for the jury. This determination not only conflicts with the holdings of other circuit courts, it violates the Seventh Amendment which only permits a jury verdict to be reexamined if it cannot be sustained as a matter of law.

Finally, due process requires implementation of uniform, clearly articulated procedures to govern the parties' and the

court's conduct at trial. This was precisely why the federal rules were adopted. That purpose has been undermined by the conflict that exists among the circuits. The contortions of the panel majority here to construe Rule 49(a) special questions as two general verdicts, and then to penalize one of the parties with a purported waiver for not calling the potential for an inconsistency to the fully-informed district court's attention under a totally different federal rule exemplifies the legal burlesque. When a dispute on something so basic as "what is a general verdict?" recurs, review is in order. This Court should resolve the conflict and articulate precise rules and procedures to govern the use of special verdicts.

I. The Answers Rendered by the Jury Were Blatantly Inconsistent. The Circuit Court Erred in Directing Entry of Judgment in Plaintiff's Favor.

The longstanding and persistent conflict among the circuits as to the appropriate procedures to be followed by parties and courts when a jury renders an inconsistent verdict is not set in a vacuum. Rather, it implicates very serious constitutional issues which underscore the need for this Court to enter the fray, so to speak, and provide guidance as to the correct interpretation of Rule 49 and the process which parties must follow in order to preserve the right to trial by jury when inconsistent jury answers appear.

As this Court held long ago, the Seventh Amendment precludes a redetermination of facts once they are found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). Accordingly, in attempting to reconcile apparently inconsistent verdicts, a court cannot simply ignore one verdict in favor of the other. "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more

reasonable." *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 115 (1963). Yet, this is precisely what the second circuit did here. It set aside the jury verdict of no defect based simply on its conclusion that there was evidence from which the jury *could* have found that the product was defective, although, *in fact,* the jury found that it was not. The circuit court then directed entry of judgment in plaintiff's favor on the strength of this "defectless" negligence finding even though the jury instructions, the law of the case and New York law required a defect in both strict products liability and negligence. The panel's determination rendered ineffective the jury's finding of no defect and was a clear violation of Ford's Seventh Amendment right to trial by jury. It cannot be sustained. *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 809 (1949) (circuit court should not have directed entry of judgment where question of fact existed as to one cause of action).

Thus, the law is well-settled that a jury verdict will only be set aside or disregarded if "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Harris v. Niagara Mohawk Power Co.*, 252 F.3d 592, 597 (2nd Cir. 2001). That was not the standard applied by the circuit court here in its determination to disregard the no defect finding. To the contrary, it simply found that the jury *could have* reached a different conclusion. App., *infra,* 34a-35a. The second circuit's determination is particularly untenable because it ignores the fact that the district court's instructions to the jury, in accordance with plaintiff's own request to charge, specifically precluded a finding of negligence if the product was not defective. Accordingly, the negligence finding rendered by the jury in this case was contrary to the law as charged and required, at a minimum, that the matter be remanded for a new trial. *Vizzini v. Ford Motor Co.*, 569 F.2d

754, 761 (3rd Cir. 1977) (verdict which showed that jury disregarded instructions requires that matter be remanded for a new trial); *Colonell v. Goodman,* 78 F. Supp. 845, 848 (E.D. Pa.), *aff'd*, 169 F.2d 275 (3rd Cir.), *cert. denied*, 335 U.S. 870 (1948) (jury's refusal to find in accordance with court's instructions necessitates award of a new trial); *see Indemnity Insurance Co. of North America v. Browning-Ferris Machinery Co.,* 227 F.2d 804, 808 (5th Cir. 1955); *McSparran v. Hanigan,* 225 F.Supp. 628, 644 (E.D. Pa. 1963), *aff'd sub nom Mcsparran v. Subers,* 356 F.2d 983 (3rd Cir. 1966) ("verdict which manifests the jury's failure to follow the court's instructions cannot stand").

The instructions to the jury in this case were in keeping with the substantive law of products liability in New York and elsewhere, pursuant to which a finding of negligent design cannot be sustained in the face of a finding of no defect. Thus, courts throughout the country have sustained the dismissal of negligent design claims when, as here, the jury finds that the product was not "unreasonably dangerous". *Garrett v. Hamilton Standard Controls, Inc.,* 850 F.2d 253, 257 (5th Cir. 1988) ("a manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective"); *Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 413 (5th Cir. 1987) (jury's rejection of strict liability theory *necessarily* rejects essential element of negligence); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971) (plaintiff attempting to prove negligence must prove product was dangerously defective at time it left the defendant's hands); *Lecy v. Bayliner Marine Corp.*, 94 Wash. App. 949, 973 P.2d 1110 (1999), *rev. denied*, 139 Wash.2d 1025, 994 P.2d 845 (2000) (where design defect is focus of the plaintiff's case, verdict of no defect in product design established "as a matter of law" that manufacturer was not negligent in design of system); *Montez v. Ford Motor Co.*, 101 Cal.App.3d 315, 319-20, 1980 Cal. App. LEXIS 1398 (4th Dist. 1980) ("a jury

determination of the nonexistence of any defect was fatal to the theory of recovery based on negligence or strict liability"); *Masi v. R.A. Jones Co.*, 163 N.J.Super. 292, 297, 394 A.2d 888, 891 (App.Div. 1978) ("the determination by the jury that defendant was not liable on the theory of strict liability eliminated the possibility that defendant could be guilty of negligence"); *Nobles v. Sofamor, S.N.C.*, 81 F.Supp.2d 735, 741 (S.D. Tex. 1999) ("the absence of a defect negated an essential element of a negligence claim"); *Willard v. Park Industries, Inc.*, 69 F.Supp.2d 268, 272 (D.N.H. 1999) (absence of proof that defendant's design posed an unreasonable danger to consumers precludes claim of negligence).

Scholars agree. *Madden & Owen on Products Liability* §8.1, at 441 (3d Ed., 2001) provides:

> proof of the defectiveness of a product's design is just as important in cases brought in negligence inasmuch as a manufacturer hardly can be at fault for selling a product with a design that is *not* defective.

The *Restatement* also agrees. Restatement (Third) of Torts: Products Liability §2, reporter's note to comment n ("failure to meet the requisites of §2(a) [manufacturing defect], (b) [design defect], or (c) [inadequate warnings] will defeat a cause of action under negligence"). Scholars have long recognized that the determination of whether a product design is "unreasonably dangerous" is the same under a negligence standard as under the risk/utility strict products liability analysis. See generally, Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth,* 1996 U. ILL. L. Rev. 743 (1996); Powers, *A Modest Proposal to Abandon Strict Products Liability,* 1991 U. ILL. L. Rev. 639 (1991); Birnbaum, *Unmasking the Test for Design defect: From Negligence [to Warranty] to Strict Liability to Negligence,* 33 Vand. L. Rev. 593 (1980).

Under these circumstances, the only way in which the second circuit's directive to enter judgment in plaintiff's favor could be sustained is upon a finding that there was no view of the evidence which could support the jury's verdict of no defect on the strict liability claim. No such finding was or could be made here. The panel left intact the no defect finding. It did not set it aside. It simply called it a "general verdict" and ignored it. This was error.

The jury's finding of no defect precludes entry of judgment in plaintiff's favor and requires that the matter be remanded for a new trial. The impact of substantive law and the jury instructions here as to the "no defect" verdict is reinforced by the Seventh Amendment and long-standing law preventing a court from disregarding the jury's sustainable determination of facts. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. at 359; *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. at 115. Here, because the circuit court did not conclude that evidence was insufficient for the jury's finding of no defect, such finding could not be erased or ignored without offending the Seventh Amendment. If the verdicts could not be reconciled, the only remedy was to order a new trial.

II The Circuits Are Divided Over the Appropriate Procedures to Follow in the Event That a Jury Renders an Inconsistent Verdict.

A. The Conflict.

The Enabling Act (28 U.S.C. § 2072) grants to this Court the right and duty to prescribe rules of practice and procedure for the lower federal courts. It was pursuant to that power that the federal rules were promulgated. A primary purpose of the federal rules was to establish a uniform system of procedure, applicable in every district court, that eliminates

unnecessary differences in the administration of judicial proceedings. *Hanna v. Plumer,* 380 U.S. 460, 472-74 (1965). This Court has inherent power to supervise the application of those rules to insure uniformity of practice among the various federal districts and circuits, and to insure that the Rules do not become a trap for unwary litigants. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

Unfortunately, such uniformity does not exist with regard to Rule 49. The rule, which governs the use of special verdicts in the federal courts, was adopted in response to difficulties posed by the basic general verdict sometimes described as "inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi." Sunderland, *Verdicts, General and Special,* 29 Yale L.J. 253, 258 (1920). The special question device or the general verdict with interrogatories was seen as a means of focusing the jury's attention on the issues, *Ware v. Reed,* 709 F.2d 345, 355 (5th Cir. 1983); avoiding confusion and uncertainty as to the jury's intent, *McGuire v. Russell Miller, Inc.,* 1 F.3d 1306, 1310 (2nd Cir. 1993); and eliminating the need for additional proceedings by identifying the bases upon which the jury rendered its verdict, *Mueller v. Hubbard Milling Co.,* 573 F.2d 1029, 1038-1039 (8th Cir.), *cert. denied,* 439 U.S. 865 (1978). Special verdict questions or interrogatories were viewed as particularly beneficial in complex cases involving multiple alternative theories of recovery because they eliminate uncertainty as to whether the verdict was based on an improper theory requiring a retrial of the entire case. Indeed, the use of special verdict questions or interrogatories in complex cases has been described "as a wonder to behold." Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 344 (1967). With the passage of time that "wonder" has turned into a tortuous trap even for the wary. The reason is the unsettled nature of the law with regard to requisite procedures which must be followed when a jury's responses to a special verdict appear inconsistent.

Rule 49 consists of two provisions. Subdivision (a) deals with the use of special questions and subdivision (b) deals with the use of a general verdict accompanied by answers to interrogatories. Subdivision (a) is silent with regard to what steps if any must be taken by a litigant or the court when confronted with an inconsistent verdict. While subdivision (b) is likewise silent as to what steps, if any, must be taken by a litigant when the jury reaches an inconsistent verdict, it does set forth the obligations of the court. Rule 49(b) requires that "when the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." Over the years a conflict has developed among the circuits as to whether and how a party must object to perceived inconsistencies in a jury's responses to special interrogatories under Rule 49. The third, fourth, fifth, ninth and tenth circuits have held that no objection is necessary in order to preserve the right to challenge an inconsistent verdict rendered under Rule 49(a). *See, e.g., Malley-Duff & Assoc. V. Crown Life Insurance Co.,* 734 F. 2d 133, 144-45 (3rd Cir.), *cert. denied,* 469 U.S. 1072 (1984) (appellate review of inconsistent verdict is not precluded by absence of objection before discharge of jury).[3] At the same time, the first, seventh, eighth and eleventh circuits seemingly disagree and require that an objection be made before the jury is discharged. *See, e.g., McKnelly v.*

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[3] The same holding was reached by *Ladnier v. Murray*, 769 F.2d 195, 198 n. 3 (4th Cir. 1985); *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040-41 (5th Cir. 1982); *Mercer v. Long Mfg. N.C. Inc.*, 671 F.2d 946 (5th Cir. 1982); *Pierce v. Southern Pacific Trans. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *RTC v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993).

Sperry Corp., 642 F.2d 1101 (8th Cir. 1981).[4] In cases under Rule 49(b) the first, third, fourth, fifth, seventh, eighth, tenth and eleventh circuits have all required a formal objection before the jury is discharged. *See, e.g., Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 725 (4th Cir. 1999) ("rule obligates a party 'to object to any asserted inconsistencies in the response to jury interrogatories prior to the discharge of the jury' and failure to comply with that obligation 'will constitute a waiver of a party's right to seek a new trial'").[5] The ninth circuit, finding that Rule 49(b) only directs the court to take action, has found that litigants have no obligation to object. *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351 (9th Cir. 1987) (a party does not waive an objection to an inconsistency between the jury's general verdict and the answer to a special interrogatory under Rule 49(b) by failing to object immediately and move for resubmission of the inconsistency before jury was dismissed).

This multifaceted conflict is further complicated by the difficulty courts sometimes have in distinguishing special verdicts under Rule 49(a) from a general verdict with interrogatories under Rule 49(b), making it all the more difficult for litigants to know the appropriate time and manner to object.

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[4]. *See, also, Fleet National Bank v. Anchor Media Television, Inc.*, 831 F.Supp. 16, 46 (D.R.I. 1993), *aff'd*, 45 F.3d 546 (1st Cir. 1995) (court fails to distinguish between Rule 49[a] and [b]); *Cundiff v. Washburn*, 393 F.2d 505 (7th Cir. 1968); *Golub v. J.W. Gant & Associates*, 863 F.2d 1516, 1521 n. 4 (11th Cir. 1989).

[5]. *See, also, Skillin v. Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981); *Walker v. Sinclair Refining Co.*, 320 F.2d 302, 305 (3rd Cir. 1963); *Stancill v. McKenzie Tank lines, Ltd.*, 497 F.2d 529, 534-535 (5th Cir. 1974); *Bates v. J.W.Jean*, 745 F.2d 1146 (7th Cir. 1984); *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299, 304 (8th Cir.), *cert. denied*, 498 U.S. 847 (1990); *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990); *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983).

See Turyna v. Martam Construction Co., 83 F.3d 178, 179 (7th Cir.1996) ("case was submitted to the jury on a form that wasn't quite a general verdict form, but it wasn't special verdicts under Federal Rules of Civil Procedure 49[a] or a general verdict with interrogatories under Rule 49[b] either"); *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 104 n.16 (3rd Cir.1993) ("In this case as in many cases, it is not entirely clear whether the verdict is governed by Rule 49[a] or [b]...."); *Arachnid, Inc. v. Medalist Marketing Corp.*, 972 F.2d 1300, 1303 n.3 (Fed. Cir.1992) ("The distinction between special verdicts and special interrogatories is unclear"); *Putnam Resources v. Pateman*, 958 F.2d 448, 455 (1st Cir.1992) ("Here, the record is unclear as to whether the case was given to the jury under Rule 49[a] or 49[b]").

At the root of this confusion is the fact that the courts either fail to understand or have lost sight of what a true general verdict is. A general verdict effectively answers just one question: "Did the plaintiff prove his or her case?" Or stated more simply, "who wins?" The general verdict does not identify or pinpoint the basis for the jury's determination or upon which legal theory plaintiff prevailed. Instead, it resolves all aspects of plaintiff's claim and disposes of the entire cause of action. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Hay v. Irving,* 893 F.2d 796, 799 (5th Cir. 1990); *Jones v. Miles,* 656 F.2d 103, 106 (5th Cir. 1981). The inclusion of such a question on the verdict sheet should be the dispositive factor in determining whether a case is governed by Rule 49(a) or (b). Nevertheless, courts continue to treat as general verdicts answers to jury questions which resolve only some of the issues in the case and which, standing alone, would not warrant the entry of judgment. That is precisely what the second circuit did here.

The ultimate result is that whether or not a party is deemed to have waived its constitutional right to enforce a jury verdict may depend entirely on where that verdict is rendered.

Such a result undermines the goal of uniformity which the federal rules were intended to achieve and should be corrected by this Court. *Weisgram v. Marley,* 528 U.S. 440, 446 (2000) (certiorari granted because "[c]ourts of appeals have divided on the question" of the authority of appellate courts to direct entry of judgment as a matter of law); *Hanna v. Plumer*, 380 U.S. at 463 (certiorari granted "because of the threat to the goal of uniformity of federal procedure posed by the decision below"); *Schlagerhauf v. Holder,* 379 U.S. 104, 109 (1964) ("we granted certiorari to review undecided questions regarding the validity and construction of Rule 35"); *Hickman v. Taylor,* 329 U.S. 495, 497 (1947) ("this case presents an important problem under the Federal Rules of Civil Procedure").

B. This Case Exacerbates the Existing Conflict.

Until recently, the view of the Second Circuit was that the issue of waiver, whether under Rule 49(a) or (b), should be decided on a case by case basis. *Denny v. Ford Motor Co.,* 42 F.3d 106, 111 (2nd Cir. 1994); *Schaafsma Morin Vermont Corp.,* 802 F.2d 629, 634 (2nd Cir. 1986). Indeed, in *Auwood v. Harry Brandt Booking Office, Inc.,* 850 F.2d 884, 890-891 (2nd Cir. 1988), the second circuit, noting the constitutional rights at stake, resolved an inconsistent verdict despite the fact that no objection had been raised. In this case, however, the second circuit has moved to the opposite extreme.

Presented with a case in which Ford did in fact comply with the requirements of Rule 49, the panel nevertheless has found that the claim of inconsistency was waived. In order to reach this conclusion the second circuit ignored the clear language of Rule 49, violated basic principles of appellate review and created a new form of verdict, "the dual general verdict," one not recognized by the federal rules. Having created a procedural vacuum, the second circuit then devised a novel procedure for dealing with inconsistent "dual general verdicts" which conflicts with the Rule 49 procedures for

dealing with inconsistent verdicts. The second circuit then applied its novel procedure *post hoc* to impose a waiver where none was intended or could have been anticipated. The second circuit has thus "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Sup. Ct. Rule 10; *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 470 (1982) ("[b]ecause of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the court of appeals, we granted certiorari."); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 570-571 (1979) ("[t]he departure by those courts from procedures normally followed . . . led us to grant certiorari.")

Rule 49(a) specifically gives the trial court broad discretion in deciding whether to use special verdicts and also with regard to the format of those questions. Pursuant to Rule 49 the court "may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate." Based on this language the circuit courts (until now) have recognized the broad discretion granted to the district courts in this area and reviewed determinations regarding whether to proceed by way of special verdicts and the format of the questions under a deferential standard. *See, e.g., Bills v. Aseltine,* 52 F.3d 596, 605 (6th Cir.), *cert. denied*, 516 U.S. 865 (1995) ("whether a court uses a special or general verdict rests in its discretion, as does the content and form of any interrogatories it chooses to submit"); *Romano v. Howarth,* 998 F.2d 101, 104 (2nd Cir. 1993) (same); *Deadwyler v. Volkswagen of America, Inc.*, 884 F.2d 779, 782 (4th Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990) (same).

Here, the second circuit ignored the deference due the district court's decision to proceed under Rule 49. It reviewed that discretionary determination *de novo*. It then substituted its discretion for the discretion of the district court and, ignoring

the fact that all of the parties and the court understood that the proceedings here were governed by Rule 49(a), decided instead that the verdict in this case was not a special verdict at all but rather two separate general verdicts. This decision is unprecedented. There is no provision in the federal rules authorizing more than one general verdict in a single cause of action. This is because, as we demonstrated, *supra*, a general verdict effectively answers just *one* question which is dispositive of the *entire* case. For this reason, as noted by the vigorous dissent, "it is truly axiomatic that *one* cause of action can produce but *one* general verdict." App., *infra,* 58a (emphasis in original).

Here, plaintiff had but one cause of action, a personal injury action seeking to recover for injuries she allegedly sustained. Each additional theory would not give plaintiff a right to recover additional damages. The fact that she sought to recover under several different theories does not give her additional causes of action. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 12-14 (1951) ("we conclude that where there is a single wrong to plaintiff, for which relief is sought . . . there is no separate and independent cause of action. . ."); *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 311 (1945) ("It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action."); *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 321 (1927) ("a cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result . . . is the violation of but one right by a single legal wrong. . . "). *Clappier v. Flynn,* 605 F.2d 519, 529 (10th Cir. 1979) ("negligence, breach of express and implied warranties, and strict liability are alternative theories for according a damaged plaintiff in a products liability action identical relief. It is clear,

particularly in products liability suits, that a plaintiff is not entitled to a separate compensatory damage award under each legal theory.")

Clearly, the verdict sheet in this case did not contain questions that were a general verdict let alone two general verdicts. It did not present one question which was dispositive of the entire cause of action. Rather, it presented seven separate questions, some with subpoints, each addressing a separate aspect of plaintiff's claim. These questions are precisely the kind of questions envisioned by Rule 49(a) as comprising a special verdict. Indeed, the very verdict sheet which the second circuit now terms two general verdicts is used regularly as a special verdict form in strict products liability cases. In all such cases the provisions of Rule 49 have been applied to determine the parties' rights. *See, e.g., Harvey v. General Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989); *Costilla v. Aluminum Co. of America,* 826 F.2d 1444, 1446 (5th Cir. 1987); *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 566 n. 26, 570 n.32 (3rd Cir. 1983). The second circuit's sudden departure from that well-settled precedent to require something more, i.e., an explicit objection pursuant to Rule 51, will turn an already confused and conflict-filled area of law into one of chaos.

Procedural due process, as guaranteed by the Fourteenth Amendment, is first and foremost "a guarantee of fair procedure." *Zimermon v. Burch,* 494 U.S. 113, 125 (1990); *Amsden v. Moran,* 904 F.2d 748, 753 (1st Cir. 1990). A party's procedural due process rights are violated when a right is taken away without warning and without an opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). That is precisely what occurred here. Ford was deprived of its Seventh Amendment right to enforce a jury verdict in its favor by the *post hoc* imposition of new procedures to govern the advent of an inconsistent verdict with no warning and no opportunity to be heard.

C. The Issue Presented by the Conflict Is Recurring and of Great Public Importance.

This Court has long recognized that "the right to trial by jury is a fundamental guarantee of the rights and liberties of the people." *Hodges v. Easton,* 106 U.S. 408, 412 (1882). Encompassed within the right to trial by jury guaranteed by the Seventh Amendment are limitations imposed upon the courts with regard to the right to reexamine a jury verdict. While this right can be waived, "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick V. Scheidt,* 293 U.S. 474, 486 (1935). Accordingly this Court had held that "every reasonable presumption should be indulged against its waiver." *Hodges v. Easton,* 106 U.S. at 412. Thus, "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 756 (1970). Waivers are not to be lightly inferred. Rather, "there must be clear and unequivocal evidence of a waiver" for a court to give it effect. *Middle Tennessee News Co. v. Charnel of Cincinnati, Inc.,* 250 F.3d 1077, 1084 (7th Cir. 2001).

To this end the federal rules set forth the procedures which must be followed in order to preserve the right to a trial by jury. *See, e.g.,* Fed.R.Civ.P. 38 (b) and (d). The same should be true with regard to the constitutionally guaranteed right that a jury verdict, once rendered will be given full force and effect. *See, e.g.,* Fed.R.Civ.P. 49 and 50. Yet in this case full compliance with Rule 49 has been deemed insufficient to preserve this fundamental constitutional right. What is worse, the confusion in this area with regard to what constitutes a general verdict, and hence with regard to whether a case comes within Rule 49 (a) or (b), and exactly what constitutes a proper objection, has made it most difficult, if not impossible, for counsel to know what steps should be taken in order to preserve

this fundamental right.

The second circuit's *post-hoc* analysis of the verdict form questions and its retrospective determination to substantially curtail the broad discretion given to the district court to control events in its courtroom is a perfect example. Here, the district court found that Ford's objection to the inconsistent verdict had been properly preserved. The district court clearly understood the tensions created by the jury's answers, and recognized its option to resubmit the issue to the jury prior to its discharge. Ford, in fact, urged that the jury not be discharged. Nevertheless, Ford, having done everything other circuits - even the most waiver-prone - require to avoid waiver, is now saddled with a formalistic waiver because it did not say the magic words "Rule 51." The result is Kafkaesque.

Thus, the circuit court here found that Ford had waived its right to preserve the jury finding of no defect even when no such waiver was intended or contemplated. Absent an abuse of discretion by the district court, a finding that a constitutional right has been preserved should not be set aside by the circuit court. *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001) ("we review a district court's determinations regarding waiver of attorney-client privilege and work-product protection for abuse of discretion" while "underlying factual findings [are reviewed] for clear error"). Certainly here, the circuit court, which was not present at the trial, was not in a position to reverse the district court's factual finding that Ford had properly preserved its objection (both pre and post verdict) and that further objections would have been futile.

The case law shows increasing turmoil on Rule 49 inconsistent verdict cases. The problem of unintended waivers is likely to recur. The more complex the cause of action, the more likely it will be framed in numerous counts some of which may overlap. With the increased advent of unintended, unknowing waivers the question of what the impact of a waiver

should be in the context of an inconsistent verdict is sure to arise. Does the failure to object to the submission of multiple counts in a complex litigation mean that an inconsistent verdict can now form the basis of a judgment; that the court can, as the circuit court did here, simply ignore one aspect of the verdict and then enter judgment accordingly? Stated otherwise, should the failure to anticipate the potential for an inconsistent verdict by objecting under Rule 51, constitute a waiver of the right to object under Rule 49 when an inconsistent verdict is actually rendered?

This products liability case is a perfect example of the context in which these issues have arisen in the past and are likely to recur. In accordance with basic principles of strict products liability, plaintiff here was permitted to proceed on two counts, strict products liability and negligence. However, the negligence count, as a matter of state substantive law and in accordance with the charge to the jury, could not stand absent a finding of defect. Nevertheless, the second circuit, totally ignoring the "no defect" verdict, directed the entry of judgment in plaintiff's favor based on the clearly inconsistent finding of negligence. That determination, if sustained and taken to its logical conclusion, means that the right to challenge the resulting verdict on inconsistency grounds is always waived absent a formal objection to the initial charge on multiple theories, for the seeds of inconsistency - the potential that the jury will ignore instructions and render contradictory verdicts - is always present in multiple theory cases. In effect Rule 49 would be of no force and effect. It means that a jury verdict of no defect (for which there is sufficient evidence) is rendered a nullity in the face of a negligence verdict simply because both issues were presented to the jury. It means that a defendant confronted with an inconsistent verdict can do nothing even when calling the inconsistency to the court's attention before the jury is discharged. This result is untenable.

If due process rights of parties are to be protected, they

must know at what stage in the proceedings they are required to object to an inconsistent verdict. Does the alert have to issue before trial, during trial, at the charging conference, or only when the inconsistent verdict is rendered? How detailed does the alert have to be? Who decides if the objection is presented with sufficient specificity - the district court or the circuit court? What is the result of a failure to object at any given point in the proceedings? Unfortunately, the answers to these questions vary from circuit to circuit and even within the circuits themselves. This case presents the Court with an opportunity to additionally clarify whether different procedures apply to Rule 49 (a) and Rule 49 (b) cases; what those procedures are; and what role, if any, Rules 46 and 51 should play in the resolution of this issue.

Indeed, this case is a perfect example of confusion by some courts as to what a general verdict truly is. Surely, so cardinal an element of jury trial practice should by now be settled. That fundamental error is reason enough for this Court to set the record straight. After all, in order to properly utilize Rule 49(b), courts need to know what a general verdict is in order to implement a form consisting of a general verdict with interrogatories. Further, if courts will convert, as the second circuit did, Rule 49(a) questions into two general verdicts and those verdicts are inconsistent, it remains for this Court to provide guidance on what to do with this inconsistency. The federal rules are silent, and the Seventh Amendment casts a giant shadow on the second circuit's bizarre approach.

Only this Court, in the exercise of its supervisory jurisdiction to insure the proper functioning of the federal judiciary, can resolve the conflicts that exist among the circuits, clarify the use of different federal rules, restore order to this unsettled area of the law, and preserve constitutional safeguards.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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September 2002

KATHLEEN MADALINE JARVIS, Individually and as a parent and guardian of Paul Michael Attila Jarvis, a minor, Plaintiff-Appellant, v. FORD MOTOR COMPANY, Defendant-Appellee

Docket Nos. 99-9405 (L), 00-9215 (CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

283 F.3d 33; 2002 U.S. App. LEXIS 1916; 51 Fed. R. Serv. 3d (Callaghan) 1310; CCH Prod. Liab. Rep. P16,251

May 14, 2001, Argued
February 7, 2002, Decided

SUBSEQUENT HISTORY: [**1] Concurring in Part and Dissenting in Part Opinion Amended February 12, 2002.

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) granting, inter alia, defendant-appellee's motions for judgment as a matter of law and for relief from an inconsistent verdict. We hold that there was a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff-appellant and, therefore, we vacate the judgment as a matter of law entered in defendant-appellee's favor and remand for the district court to reinstate the jury verdict and award of damages. We also find that defendant-appellee's claim of error arising from an allegedly inconsistent verdict was not adequately preserved and find no fundamental error in the jury instructions and verdict form. Finally, finding no abuse of discretion in the district court's failure to hold a hearing, we affirm the district court's determination of the amount by which the jury award should be adjusted to reflect collateral source payments

pursuant to N.Y.C.P.L.R. 4545(c).
Jarvis v. Ford Motor Co., 69 F. Supp. 2d 582, 1999 U.S. Dist. LEXIS 16838 (S.D.N.Y. 1999). [**2]

DISPOSITION: Vacated and remanded in part, affirmed in part. Affirmed in part and vacated in part and remanded.

COUNSEL: THOMAS J. MURRAY, Murray & Murray Co., L.P.A., Sandusky, Ohio (George N. Tompkins, Jr., Schnader Harrison Segal & Lewis LLP, New York, NY, and Mary S. Birkett on the brief), for plaintiff-appellant.

JEFFREY C. SENDZIAK, Gibson, McAskill & Crosby, Buffalo, NY (Brian P. Crosby on the brief), for defendant-appellee.

JUDGES: VAN GRAAFEILAND, Senior Circuit Judge, concurring in part and dissenting in part.

OPINIONBY: SOTOMAYOR

OPINION: [*38]

SOTOMAYOR, *Circuit Judge*:

A six-day-old 1991 Ford Aerostar driven by plaintiff-appellant Kathleen Jarvis suddenly accelerated, resulting in an accident from which Jarvis sustained serious injuries. Jarvis contends that the Aerostar "took off" without her depressing the accelerator and that she was unable to stop the van by pumping the brakes.

Jarvis sued defendant-appellee Ford Motor Company ("Ford") in the United States District Court for the Southern District of New York (Buchwald, J.) claiming, *inter alia*, that Ford was negligent and should be held strictly liable for the design of the

[**3] Aerostar's cruise control mechanism. A jury returned a verdict for Jarvis on her negligence claim but not on her strict products liability claim and awarded her damages. Ford objected to the verdict as inconsistent. The district court agreed but did not assign a remedy because it held that the evidence was insufficient to support a verdict for Jarvis, granting Ford's Fed. R. Civ. P. 50(b) motion for judgment as a matter of law and dismissing the complaint. For the sake of completeness, the court also granted Ford's motion to reduce the amount of the verdict because of collateral source payments pursuant to N.Y.C.P.L.R. 4545.

We vacate the grant of judgment as a matter of law for Ford and remand for the district court to reinstate the jury verdict and award of damages as adjusted by the collateral source payments. Jarvis's evidence, if credited by the jury, was sufficient to establish that the Aerostar malfunctioned due to Ford's negligent design. To prove negligence, Jarvis was not required to establish what specific defect caused the Aerostar to malfunction. Ford, for its part, did not prove that a malfunction was so unlikely as to warrant judgment as a matter of law in its favor. [**4]

We also hold that the district court failed to apply the correct legal standard to Ford's objection to an allegedly inconsistent verdict. Applying the correct standard under Fed. R. Civ. P. 51, we find that Ford waived any claim of error by failing to state distinctly the nature and basis of its objection before the jury retired to deliberate and that there was no fundamental error in the jury instructions or verdict sheet warranting relief on appeal. Finally, we hold that the district court did not abuse its discretion in not conducting a hearing on collateral source payments, as Jarvis failed to raise a disputed issue of material fact regarding Ford's evidence of such payments.

BACKGROUND

Viewed in the light most favorable to Jarvis as the party challenging the grant of judgment as a matter of law, the record presents the following facts.

A. The Accident

Jarvis testified at trial that, in 1991, she started her six-day-old Ford Aerostar in the driveway of her home in rural Woodstock, New York with her right foot "lightly on the brake." After she turned on the ignition, the engine suddenly revved and the vehicle "took off." As the van accelerated, [*39] Jarvis pumped the [**5] brake with both feet, looking down to make sure her feet were on the brake pedal. The van would not stop. She steered to avoid people walking in the road and then heard saplings brushing against the side of the van before she blacked out. Jarvis testified that she had driven many different kinds of vehicles over the twenty-four years since she had first acquired a driver's license, and that, prior to this incident, she had never had a driving accident.

Jarvis's father, who was standing nearby, testified that he saw the car starting off at an "unusually fast speed" for his daughter. As the Aerostar passed him, he saw Jarvis "holding on to the steering wheel very tight and her body was going back and forth ever so slightly." Jarvis's father testified that as Jarvis was removed from the van after the accident, she screamed, "there's something wrong. The brakes don't work. There's something wrong with that car. The brakes don't work." As a result of the accident, Jarvis sustained a traumatic head injury and could not return to her previous employment.

Plaintiff's reconstruction expert, George Pope, testified that the van traveled approximately 330 feet and did some braking that

slowed [**6] it to 15 to 20 miles per hour before it entered a ditch and turned over. Pope testified that the Aerostar had vacuum power brakes that draw their vacuum from the engine, but that the engine does not create the necessary vacuum when accelerating full throttle. Even though a check valve traps a reservoir of vacuum for use when the engine vacuum is low, this reserve can be depleted after one-and-a-half hard brake applications. Therefore, according to Pope, if Jarvis were pumping the brakes in an effort to stop the Aerostar after it began accelerating at full throttle, she would lose approximately one thousand pounds of additional force that the booster normally could supply to her brakes. Pope concluded that "under those circumstances []it will feel to a person like they've lost their brakes, [because] they're pushing and nothing is happening."

Joanne Valentine-Simonian, a passerby, testified that she watched Jarvis's van pass and that she saw the van moving quickly down the road and ran toward the woods. As she looked back to see the van pass, she did not see any brake lights. A police officer who was called to the scene of the accident testified that he saw no marks on the road [**7] near the accident except in the ditch where the Aerostar turned over. Jarvis's father had been the last one to use the Aerostar before the accident. When asked at trial whether he had left the parking brake on, Jarvis's father testified that it was his "normal habit" to put it on, but that he had "no memory of it as such" in this case. When asked directly, he answered, "I'm not certain I put it in with the parking brake on." Pope testified that the Aerostar has two instrument panel lights related to the braking system. When the parking brake is left on, a red light is illuminated on the right side of the dash below the horizontal center point. A second light, amber in color and located on the upper left corner of the dash panel, is related to the rear anti-lock brake system and will illuminate for two seconds after the ignition is turned

on and the van moves forward while the system reviews its components to ensure that they are fucntioning properly. Jarvis testified that she saw one white or light yellow light illuminated high on the dashboard toward the left and that, "as I'm recalling[,] it said brake." Asked specifically if she had seen a red light illuminated on the panel from [**8] the beginning to the end of the incident, she answered no.

[*40] In support of Jarvis's claim that the Aerostar had suddenly accelerated without her pressing the accelerator, Jarvis presented testimony from other Aerostar owners who recounted having similar problems. Jacqueline Gibbs testified that she had her foot on the brake the entire time her 1989 Aerostar sped away, yet engineers at Ford could later find nothing mechanically wrong with the van. David Neil Morse testified that a two-day-old 1990 Aerostar he was driving opened up, full throttle, while he was stopped at a gas station and that, even though he weighed 200 pounds and pushed as hard as he could on the brake pedal, he only managed to stop the vehicle by turning off the ignition. [1] Theda Gayle Blackstone testified that, when she attempted to restart her 1990 Aerostar at a gas station and put it in gear, even though her foot was on the brake, it "absolutely roared and leapt out" hitting cars and continuing onto the highway causing accidents. Mary Moore testified that in 1989 she started her Aerostar in a shopping center parking lot

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[1] Although we need not reach the evidentiary issues raised by Jarvis on appeal, we note that Jarvis had wanted to admit into evidence a Ford Aerostar's shop manual that cautioned Ford dealers and technicians to turn off the ignition should the Aerostar "go out of control and overspeed" during road-tests for cruise control malfunctions. Jarvis claimed that this manual demonstrated that Ford was aware of the danger of sudden acceleration and understood that braking might not be effective in stopping an Aerostar experiencing sudden acceleration.

and it began to accelerate in reverse, even though she had her foot on the brake. Linda Karen [**9] Schmidt testified that her 1990 Aerostar, after less than 10,000 miles of use, first "tore backwards" when she shifted into reverse, and then went forward as she tried to shift into park, eventually causing her to jump from the van after she failed to stop it by pressing the brake with both feet. In addition, the jury was presented with evidence that Ford had received reports of incidents of sudden acceleration in a total of 560 Aerostars.

Jarvis filed this diversity action [**10] in the Southern District of New York (Naomi Reice Buchwald, Judge) alleging that a defect in the Aerostar had caused the sudden and uncontrollable acceleration and pleading causes of action under theories of negligence and strict products liability under New York law. In 1999, a jury trial was held. Jarvis relied principally on her own testimony that her Aerostar suddenly accelerated without her depressing the accelerator and on experts who offered a theory to explain why the Aerostar malfunctioned and how this defect could be remedied. In its defense, Ford claimed principally that the acceleration was the result of Jarvis's driver error that mistook the accelerator pedal for the brake pedal, while unaware that the parking brake had been set. Ford also presented expert testimony to show that the Aerostar could not have malfunctioned in the manner suggested by Jarvis's experts.

B. Jarvis's Sudden Acceleration Theory

Samuel J. Sero, an electrical engineer, testified at trial as an expert for Jarvis. He hypothesized that unintended electrical connections had caused current to run to the cruise control "servo," opening the throttle and making the vehicle accelerate. The cruise control [**11] servo opens the throttle by means of a vacuum mechanism that has two valves, the vacuum, or "vac," valve and the vent valve. The vent and vac valves are controlled

by wires attached to the "speed amplifier." Victor J. DeClercq, a former Ford design analyst engineer and expert for Ford, agreed that if there was a simultaneous short in the vent and the vac [*41] wires, the cruise control servo would open the throttle without the driver pressing the accelerator.[2] The dispute among the experts, however, was whether these kinds of electrical malfunctions could spontaneously occur and, if so, whether a failsafe mechanical device called a "dump valve" would, despite these malfunctions, disengage the cruise control servo as soon as Jarvis pressed the brake pedal, bringing the sudden acceleration to an end and the vehicle to a stop. DeClercq stated that, to the best of his knowledge, Ford did not test for the fault that Sero suggested as part of its standard failure mode effects analysis of its vehicles.

Sero's theory requires two simultaneous malfunctions in the cruise control circuitry. The first is an open ground connection to the speed amplifier, resulting from a loose or broken wire. DeClercq testified that he examined the ground wire in Jarvis's Aerostar after the accident and did not find any evidence that it was cut, was loose, or had shorted out. Sero testified that by the time he examined Jarvis's Aerostar, certain repairs had been made and some parts had been removed from the vehicle for examination, making it difficult to know what condition the wires were in at the time of the accident. The second problem required under Sero's theory is a fault to ground of the vent or the "vac" wires.[3] According to Sero, an unintended grounding

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[2] DeClercq suggested that these faults would open the throttle approximately 75%.

[3] Sero also stated that the same malfunction could result if both the vent and vac wires were grounded at the same time.

of the vent or the vac wire could occur due to (a) moisture or debris on the circuitry; (b) heat that causes the circuit board to "expand" or "bow up"; or (c) a nick in the wire insulation permitting direct contact with metal. There was no physical evidence that any of these events occurred at the time of Jarvis's accident, but Sero described these as "random transient events" - the first two, at least, could potentially leave no trace. Ford [**13] tested the moisture hypothesis by spraying water outside the vehicle and under the hood for one minute and then ran it for fifteen minutes without encountering any problems.

C. The Dump Valve

Ford maintained at trial that the existence of the Aerostar's dump valve, a spring-loaded plunger designed to open when the brake pedal is depressed, would have effectively stopped the Aerostar from accelerating when Jarvis applied the brakes, even if the cruise control malfunctioned as Sero suggested. The dump valve is a mechanical - as opposed to electronic - device that releases a vacuum and closes the throttle, terminating any wide open throttle condition and returning the throttle to neutral. Jarvis testified that she tried to stop the Aerostar by pumping the brakes, as her father had taught her to do when she was first

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Sero proffered a separate theory that does not depend on grounded wires but rather on a stray electromagnetic signal to fire the output transistors on the speed amplifier. *Jarvis v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 10041, No. 92 Civ. 2900 (NRB), 1999 WL 461813, at *3 (S.D.N.Y. July 6, 1999). Sero suggested this signal could come from "radio frequency, electromagnetic induction, electrostatic discharge, spiking off the generator, or the variable speed sensor." *Id.* Following a pre-trial *Daubert* hearing, the district court deemed that the testimony regarding this theory was inadmissible after finding that "Sero had neither replicated this condition in a model nor witnessed it in real life prior to the hearing." *Id.* at *4.

learning to drive.

Jarvis offered three possible explanations at trial for why the dump valve did not permit Jarvis to stop the Aerostar from accelerating: (1) the dump valve was [*42] malfunctioning; (2) Jarvis was pumping the brakes, causing the Aerostar to reinstate the electrical malfunction and commence acceleration every time her foot rose from the pedal in the pumping action; or (3) Jarvis had not pressed far enough on the brakes to activate the dump valve. Concerning the first alternative, DeClercq testified that he tested the dump [**15] valve after the accident and found that it had no leaks. There was no evidence as to whether the dump valve could have malfunctioned in some other way that would not have necessarily been evident at the time that DeClercq examined the Aerostar. In response to questioning at trial as to why the dump valve would not have prevented the accident, Sero stated, "You are assuming that the dump valve was open. I think that's not a very good assumption. You have no proof that it was, nor do I. We have also no proof of how hard she was on the brake." In response to a question by Ford concerning whether Sero had "any evidence" that the dump valve was not functioning properly the day of the accident, Sero responded: "No, nor is there evidence that it did function that way on the day of the accident, except for the fact that it took off, which would seem categorical evidence that it did not function correctly."

The experts appear to agree that, even assuming that the dump valve was functioning properly, the electrical malfunction in the cruise control could be reinstated every time Jarvis lifted her foot from the brake pedal, causing the Aerostar to begin accelerating anew. The third scenario [**16] could explain why the Aerostar initially accelerated while Jarvis had her foot only "lightly" on the brake before she turned on the ignition but would not explain why the dump valve did not open later when

Jarvis had her feet firmly on the brake pedal.

D. Possible Alternative Designs

Sero testified that the possible malfunctions he had elucidated could be avoided by installing an inexpensive on/off switch, costing a few dollars at most, in the cruise control mechanism that would allow power to the servo only when the cruise control was engaged. Alternatively, Sero suggested the installation of an "over current relay," which would sense the grounding problem and stop the acceleration. According to Sero, these solutions would address the root cause of the possible malfunctions in the design of the Aerostar that permit battery power to be supplied to the servo at the moment the ignition is turned on without the driver having engaged the cruise control or stepped on the accelerator.

E. The Jury Verdict

After a two-week trial, the jury found that the cruise control system of the 1991 Aerostar was not "designed in a defective manner," but that Ford nevertheless "was negligent [**17] in the design of the cruise control system" and that this was a substantial factor in causing the accident. The jury found that Jarvis's negligence was also a substantial factor in causing the accident and apportioned 65% of the fault to Ford and 35% to Jarvis. [4] The jury awarded damages for past and future medical

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[4] Before the jury was evidence that the Aerostar's owner's manual directs drivers to apply the brakes firmly with one stroke and not in a pumping action. A single application of the brakes, according to the testimony, would not have exhausted the vacuum reservoir of the power assist to the brakes, aiding Jarvis's ability to stop the vehicle.

insurance premiums, lost earnings, and pain and suffering. [5]

[*43] Ford moved under Fed. R. Civ. P. 50(b) for judgment as a matter of law, claiming that the only logical conclusion that can be drawn from the evidence is that the plaintiff never applied the brake pedal during the accident, but mistakenly applied the accelerator." Alternatively, Ford claimed that the jury's verdict was inconsistent because Ford could not have negligently designed the cruise control if there was no defect in its design. Ford also moved to reduce the verdict by the amount of collateral source payments totaling $ 473,469 pursuant to N.Y.C.P.L.R. 4545. Finally, Ford asked the court to rule on its previously filed motion to dismiss plaintiff's punitive damages claim. The district court granted all of these motions and entered judgment for Ford. A few months after trial, Jarvis moved for relief from the final judgment under Fed. R. Civ. P. 60(b), alleging that Ford had engaged in fraud, misrepresentation, and misconduct by withholding from Jarvis and from the district court documents that the court had ordered to be produced, by making false claims, and by presenting false testimony. The district court denied the motion.

DISCUSSION

A. Ford's Motion for Judgment [**19] as a Matter of Law

Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient

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[5] For damages up to the date of the verdict, the jury awarded $24,568 in past medical insurance premiums, $340,338 in lost earnings, and $200,000 in pain and suffering. For future damages, the jury awarded $22,955 in medical insurance premiums, $648,944 in lost earnings, and $300,000 for pain and suffering.

evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). In ruling on a Rule 50 motion, "the trial court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Tolbert v. Queens College*, 242 F.3d 58, 70 (2d Cir. 2001) (internal citations omitted). We review the district court's grant of a motion for judgment as a matter of law *de novo*, *see Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000), applying the same standard that a [**20] district court must apply, *see LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir. 1995).

We hold that there was a legally sufficient evidentiary basis for a reasonable jury to find that Ford had negligently designed the cruise control of the 1991 Aerostar. Jarvis presented evidence which the jury could credit that her Aerostar suddenly accelerated without her depressing the accelerator and that she was not able to stop the Aerostar by pumping the brakes. This proof included her testimony, the testimony of other Aerostar owners who had experienced similar problems, and evidence that hundreds of additional Aerostar owners had reportedly experienced sudden acceleration. She also presented an expert who offered a theory to explain why the cruise control had malfunctioned causing the Aerostar suddenly to accelerate, and who proposed an inexpensive remedy for this problem. The district court found this expert testimony to be admissible in a *Daubert* hearing, and the jury was entitled to credit it. Ford presented evidence that identified weaknesses in this theory, principally that there was no physical evidence that the defects hypothesized by Jarvis [**21] caused the cruise control to malfunction and suggested that [*44] driver error had caused

the accident. We hold, however, that neither Ford's evidence of the unlikely nature of the specific defect that Jarvis had posited nor Ford's theory that the accident had been caused by driver error so outweighed Jarvis's proof that no reasonable jury could find for Jarvis. In so holding, we recognize the settled principle of New York law that a plaintiff in a products liability action is not required to prove a specific defect when a defect may be inferred from proof that the product did not perform as intended by the manufacturer.

1. New York Law of Negligent Design

The New York Court of Appeals has established that "a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended." *Micallef v. Miehle-Goss* Co., 39 N.Y.2d 376, 348 N.E.2d 571, 577, 384 N.Y.S.2d 115 (N.Y. 1976). [**22] The court explained that "what constitutes reasonable care will . . . involve a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effect to avoid the harm." 348 N.Ed. 2d at 577-78 (internal quotation marks omitted).

As applied to the facts of this case, the jury charge on negligent design restated this standard as comprising three elements: (1) that the cruise control system in the 1991 Aerostar was defective when put on the market by Ford; (2) that the defect made it reasonably certain that the vehicle would be dangerous when put to normal use; and (3) that "Ford failed to use reasonable care in designing the cruise control system or in inspecting it or testing it for defects, or that even though Ford used reasonable care in designing, inspecting and testing the cruise control system in the 1991 Aerostar, that Ford learned of

the defect before putting the product on the market and did nothing about it."

The New York Court of Appeals has held that a plaintiff's failure to prove why a product malfunctioned does not necessarily [**23] prevent a plaintiff from showing that the product was "defective." In *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (N.Y. 1973), a four-month-old car driven by Paglia suddenly and inexplicably drifted across the road's dividing line into oncoming traffic. 298 N.E.2d at 624. Chrysler, in defending the suit, stressed that Paglia had failed to prove any specific defect - emphasizing in particular the inadequacy of the plaintiff's post-accident tests to demonstrate a specific defect. 298 N.E.2d at 625. The New York Court of Appeals rejected this argument and upheld an instruction to the jury on breach of warranty that explained:

> While the burden is upon the plaintiff to prove that the product was defective and that the defect existed while the product was in the manufacturer's possession, plaintiff is not required to prove the specific defect, especially where the product is complicated in nature. Proof of necessary facts may be circumstantial. Though the happening of the accident is not proof of a defective condition, a defect may be inferred from proof that the product did not perform as intended by the manufacturer . . . .

Id. Accordingly, [**24] the Court of Appeals affirmed the jury's conclusion that "the steering mechanism of the automobile was not fit for the purpose for which it was intended." Id. at 338.

A later New York Court of Appeals case similarly rejected the

contention that a plaintiff injured by an exploding can of Freon had failed to make out a *prima* [*45] *facie* breach of warranty claim when no particular defect in the packaged refrigerant was ever discovered. *Halloran v. Virginia Chemicals Inc.*, 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (N.Y. 1977). The court stated that

> if plaintiff has proven that the product has not performed as intended and excluded all causes of the accident not attributable to defendant, the fact finder may, even if the particular defect has not been proven, infer that the accident could only have occurred due to some defect in the product or its packaging.

361 N.E.2d at 993.

The same principles hold in products liability actions brought under a theory of negligent design. *See, e.g., Gargano v. Rosenthal*, 100 A.D.2d 534, 473 N.Y.S.2d 225, 227 [**25] (2d Dep't 1984) (citing *Halloran* in finding that causes of action for products liability, including those under theories of negligence, breach of warranty, and strict liability, may be proven "through circumstantial evidence, by showing that the vehicle's transmission and gearshift did not perform as intended and by excluding all causes of the accident not attributable to [defendants'] conduct"); *Hunter v. Ford Motor Co.*, 37 A.D.2d 335, 325 N.Y.S.2d 469, 471 (3d Dep't 1971) ("Although in both actions in negligence and breach of warranty a plaintiff must come forward with evidence of a defect, existence of the causative defect is provable by circumstantial evidence. The precise defect need not be named and proved; it is sufficient if the cumulation of circumstances and inferences . . . supports the conclusion that there was a defect which caused the accident.");

see also Sanders v. Quikstak, Inc., 889 F. Supp. 128, 131 (S.D.N.Y. 1995) (citing *Halloran* in stating that to prove negligence, breach of warranty, and strict products liability under New York law, "despite an absence of proof of any specific defect in a product, [**26] a jury may infer that an accident occurred because of a defect when the plaintiff has proven that the product did not perform as intended and has excluded all causes of the accident not attributable to the defendant"). [6]

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[6] For strict products liability, the Restatement (Third) of Torts similarly observes that a product may be found to be defective without proof of the specific malfunction:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Restatement (Third) of Torts: Product Liability § 3 (1998). In comment c to this section, the Restatement notes:

> *No requirement that plaintiff prove what aspect of the product was defective.* The inference of defect may be drawn under this Section without proof of the specific defect. Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed. For example, if an inference of defect can be appropriately drawn in connection with the catastrophic failure of an airplane, the plaintiff need not establish whether the failure is attributable to fuel-tank explosion or engine malfunction.

Id.; see also Restatement (Third) of Torts: Products Liability § 3 (1997

2. The District Court's Grant of Judgment as a Matter of Law

In granting Ford's motion for judgment as a matter of law, the district court relied upon the fact that Jarvis's expert had not established that the cruise control malfunctions he outlined were "substantially likely to occur or, even assuming they [*46] did, that the mechanical features of the car would not have overcome the resulting wide open throttle condition." *Jarvis v. Ford Motor Co.*, 69 F. Supp. 2d 582, 599 (S.D.N.Y. 1999). The court stated that Jarvis "has offered no evidence to suggest how frequently the design defect is likely to occur," *id.*, or "any evidence that the attenuated chain of events necessary to result in an accident is likely to occur, let alone with significant regularity." *Id.* at 600. Concerning the need for scientific proof of a defect, the court found that it is not

> sufficient for plaintiff to simply define away the need to present proof of its theory by suggesting that there will be no trace of the electrical events posited . . . . In the absence of evidence, plaintiff cannot meet its burden to establish that its version of events is more probable than [**28] not. It is, in part, because of the necessity of an expert's explanation for the events at issue that we find it unreasonable to rely on the testimony of five other individuals who reported experiencing sudden accelerations in Ford Aerostars . . ., as well as an even greater number of complaints (totaling 560) investigated by Ford and catalogued . . . [of] alleged unintended acceleration incidents . . ., as an adequate substitute for the presentation of a viable expert explanation of this

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Main Volume Comments) (collecting cases that have followed this rule).

> incident. . . . In reaching this conclusion, we do not mean to suggest that similar act evidence may not be significant in other design defect cases or that the testimony of other incidents could not have been probative of plaintiff's credibility had plaintiff surpassed her initial hurdle of establishing that the "defect" was more than theoretical.

Id. at 601 n.41.

3. Jarvis's Proof of Negligent Design

The district court erred in requiring proof of a specific defect in the Aerostar's cruise control and in not considering Jarvis's circumstantial evidence of a defect. The malfunction in the design of the Aerostar that Jarvis has alleged is that it suddenly accelerated, opening full [**29] throttle without Jarvis depressing the accelerator pedal, and that her efforts to stop the vehicle by pumping the brakes were unavailing. If Jarvis's six-day-old Aerostar performed in this manner, a jury could reasonably conclude that it was "defective when put on the market by Ford," and that "the defect made it reasonably certain that the vehicle would be dangerous when put to normal use," as required by the first two elements of the jury charge regarding negligent design. Although Ford argued that the accident was caused instead by driver error, this theory would have been rejected if the jury had believed Jarvis's testimony that she had her feet on the brake and not on the accelerator, as Ford claimed. The final element of the negligence charge asking whether Ford breached its duty of care, required "a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." *Micallef,* 348 N.E.2d at 577. Construing the evidence in Jarvis's favor and crediting her version of events, a reasonable jury could find that Ford breached its duty of care.

Even accepting as true that sudden [**30] acceleration in the 1991 Aerostar would occur, at most, very infrequently when measured against all Aerostar ignition starts, the consequences of sudden acceleration could easily be catastrophic, the design of which Jarvis complains has no particular utility to balance its potential for harm, and, according to Jarvis's expert, the malfunction in the cruise control could be avoided by an inexpensive switch that would shut off power to the cruise control when not in use.

[*47] A different case would be presented if Jarvis had been found unconscious in her overturned Aerostar, with no memory of or witnesses to the accident. In such a case, Jarvis would have to rely more heavily upon scientific evidence to demonstrate that the accident was caused by sudden acceleration. Our decision in *Fane v. Zimmer, Inc.*, 927 F.2d 124 (2d Cir. 1991), relied upon by the district court, makes this precise distinction. The plaintiff in *Fane* needed to show, at the very least, that the plaintiff's internal injuries occurred after a medical device implanted in the plaintiff's hip broke. Id. at 131. Unlike Jarvis's in accident, we noted in *Fane* that "no one observed the [**31] accident in this case; and no one knows for sure how it happened." *Id.* Here, Jarvis offered testimony which a reasonable jury could believe to the effect that the Aerostar's sudden acceleration, not driver error, was the cause of her accident. [7]

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[7] The other cases relied upon by the district court, taken from the fields of toxic torts and medical device malfunctions, involved the distinct issue, not present here, of the causal link between a defect or dangerous condition and the injury alleged. *Jarvis*, 69 F. Supp. 2d at 592 (citing *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1133 (2d Cir. 1995) (emphasizing the importance of scientific evidence in proving the causal link between construction workers' exposure to asbestos and the plaintiff's cancer); *In re "Agent Orange"* Product Liability Litigation, 611 F. Supp.

4. The Sufficiency of the Evidence

The district court also found that, apart from the issue of scientific evidence of a specific defect, "there is such an overwhelming amount of evidence in favor of the defendant that reasonable and fair minded persons could not arrive at a verdict" in favor of Jarvis. Jarvis, 69 F. Supp. 2d at 602. In support of this conclusion, the district court stated that testimony from Jarvis's own witnesses "demonstrated essentially . . . that the July 14, 1991 incident was not the result of plaintiff's sudden acceleration theory." *Id.* Specifically, the district court emphasized that (1) Jarvis offered no physical evidence of either the specific defect in the cruise control mechanism or of a defect in the "dump valve," and (2) Sero's theory that Jarvis's pumping of the brakes contributed to the accident was undermined by testimony by Jarvis's expert Pope.

Even though, as discussed above, the law does not require Jarvis to prove what specific defect caused the cruise control to malfunction, Ford conceivably could have offered scientific proof that the cruise control would not have malfunctioned in the manner alleged that so outweighed [**33] Jarvis's proof that it malfunctioned as to warrant judgment as a matter of law for

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1223, 1262-63 (E.D.N.Y. 1985) (noting the difficulty in demonstrating a causal link between exposure to Agent Orange and diseases from which the plaintiffs suffered); *Gold v. Dalkon Shield Claimants Trust*, 1998 U.S. Dist. LEXIS 22413, No. B-82-383, 1998 WL 351456, at *3 (D. Conn. June 15, 1998) (requiring expert testimony to establish a causal link between a defect in the Dalkon Shield and the plaintiff's alleged injuries)). In contrast, if Jarvis can establish that her Aerostar malfunctioned by suddenly accelerating, proving a causal link between the sudden acceleration and the ensuing accident is a relatively easy matter.

Ford. This is not such a case. To explain why, we first examine the evidentiary value of Sero's theory and then address particular issues of fact that the district court resolved in favor of Ford but that we conclude were left open by the evidence and, accordingly, were matters for the jury to decide.

a. The Evidentiary Value of Sero's Theory

In its *Daubert* hearing, the district court fully analyzed Sero's proposed testimony [*48] under the factors established by the Supreme Court and found the testimony admissible. [8] The jury was entitled to consider this evidence, even if it did not conclusively demonstrate - as it need not - what specific defect caused the Aerostar's cruise control to malfunction. The district court did not strike the *Daubert* testimony before evaluating Ford's motion for judgment as a matter of law or recant its *Daubert* findings in ultimately granting that motion. Nor has Ford appealed the results of the *Daubert* hearing. So we need not rule on the district court's *Daubert* findings. However, we briefly review those findings, as they help to illustrate the role of [**34] Sero's testimony within Jarvis's case presented at trial.

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[8] *The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), stated that a trial court's decision whether to admit into evidence a proffered expert theory should ordinarily weigh (1) "whether it can be (and has been) tested," *id.* at 593; (2) whether it "has been subjected to peer review and publication," *id.*; (3) its "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation," *id.* at 594; and (4) its general acceptance, which "can," *id.*, have a bearing on theory's "evidentiary reliability -- that is, trustworthiness," *id.* at 590 n.9 (emphasis omitted).

Under the first *Daubert* factor, the court found that "Sero has sufficiently tested and replicated" [**35] the theory of two independent faults - one of the ground of the cruise control servo and another of the vent and/or vac wires. *Jarvis*, 1999 U.S. Dist. LEXIS 10041, 1999 WL 461813, at *4. The court was satisfied that Sero's findings "have been sufficiently verified through repeated tests on a model that accurately reflects the relevant electrical components on the 1991 Ford Aerostar." *Id.* The court further noted that Ford did not dispute that "Sero's manipulation of the cruise control components can result in sudden, unintended acceleration," and argued only that Sero had never observed the same results "in the real world." *Id.* Meanwhile, the court was careful to exclude another of Sero's theories that did not satisfy this first prong of the *Daubert* test. [WL] at **4-5.

As to the second *Daubert* factor, the court held that even though Sero's findings had been neither published nor peer reviewed, this alone was not a sufficient reason to exclude Sero's testimony. [WL] at *6.[9] The district court dismissed criticisms under the third *Daubert* factor that these theories had not been tested for their rate of error. In this regard, the court stated [**36] that Sero was not "proposing to testify as to the likelihood that a malfunction in the cruise control caused [Jarvis's] accident. " Rather, the court pointed out:

> Sero is proposing to testify that the design of the 1991 Aerostar makes it physically possible for this malfunction to occur, and wishes to demonstrate to the

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[9] Jarvis explains the lack of publication or peer review as understandable because Sero was the first to "crack the code" as to the causes of sudden acceleration. [WL] at *5.

> jury how it can happen. Plaintiff presumably will seek to establish specific causation either through its accident reconstructionist or by attempting to draw inferences from the circumstantial evidence.
>
> Unlike the more typical case in which an expert testifies to specific causation and uses a statistical sampling method to determine the likelihood of the event occurring in the particular case, here plaintiff's expert proposes to testify about general causation and relies on modeling and a fault analysis to demonstrate known physical and electrical principles. . . .
>
> [*49] Defendant's dispute with Sero's . . . findings lies not in their possibility, but in the likelihood that such conditions will occur in the "real world." . . . . Disputes over the conclusions that can be drawn from the results of Sero's modeling analysis is properly the province of the jury.

[**37] [WL] at **6-7.

Turning to the fourth *Daubert* factor, which tests the degree to which the expert's technique has been generally accepted in the scientific community, the district court observed that Ford "does not specifically challenge Sero's methodology." [WL] at *6. Sero claimed to have used "failure mode analysis" on the 1991 Ford Aerostar cruise control system, a "standard approach" to evaluating the design of a component. *Id.* The district court concluded that Ford "has not asserted that Sero's approach lacks support in the engineering community and we have no reason to believe such a technique is unreliable." *Id.*

The court next addressed a 1989 report prepared by the National Highway Traffic and Safety Administration ("NHTSA") finding that the occurrence of the two independent electrical failures, as suggested [**38] by Sero, "is virtually impossible." [WL] at *8. The court noted that the NHTSA may not have recognized that sudden acceleration could be caused, under Sero's theories, from a dead stop, and that because the court did not have further evidence as to the basis of the NHTSA's conclusions, it would not exclude Sero's testimony solely on the basis of the contrary conclusion reached by the NHTSA. [WL] at *9.

The court recognized that Jarvis's inability to offer physical evidence from the accident in support of the specific defects Sero discussed could affect the weight the jury gave to these theories. The court concluded, however, that this fact did not affect the admissibility of these theories to explain the specific defect that caused Jarvis's Aerostar to accelerate because, "it is basic . . . to Sero's theory that there will be no physical evidence that the electrical events occurred." Jarvis, 69 F. Supp. 2d at 595. [10] What weight should be given to this evidence remained for the jury to decide.

b. The Loss of Braking Power

Jarvis also presented evidence at trial that sudden acceleration not only would open the throttle to her Aerostar but also would

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[10] Although the district court later characterized its admission of Sero's theories into evidence as "based on plaintiff's representation that they would be connected by direct and circumstantial evidence to the accident at issue," *Jarvis*, 69 F. Supp. 2d at 594 n.19, we have found no indication that the jury was instructed to disregard Sero's theory because of Jarvis's inability to prove certain facts

decrease significantly her ability to restrain the vehicle by pumping the brakes. Pope, Jarvis's expert, testified that the Aerostar had vacuum power brakes that draw their vacuum from the engine. When accelerating at full throttle, Pope testified, the engine does not create the normal vacuum that assists in braking. An additional reservoir of vacuum could be depleted by pumping the brakes, as Jarvis testified she did in this case. The expert concluded that "under those circumstances []it will feel to a person like they've lost their brakes, they're pushing and nothing is happening."

Calling this theory into question when ruling on Ford's motion for judgment as a matter of law, the district court pointed to testimony by Pope on cross-examination acknowledging that, assuming that the dump valve was working properly and that it would engage when the brake pedal was depressed approximately half an inch, in a "normal pumping phase, the dump valve is always going to be open, so you are never [*50] going to be out of vacuum assist. [**40] " *Jarvis*, 69 F. Supp. 2d at 598. Construing the evidence in the light most favorable to Jarvis, Pope's statement does not establish whether he was referring to a single depression of the brake pedal or how long he assumed the pedal was depressed. These additional factors are crucial for determining when Jarvis's brakes would exhaust the vacuum reservoir making it difficult to slow the vehicle. Admittedly, no record exists of how many times Jarvis pumped the brakes, how long each stroke lasted, or how far she depressed the pedal in each stroke. Such a record would allow a more exact analysis of how the depletion of the vacuum reservoir may have been counter-balanced by the engine replenishing the vacuum, if the dump valve were functioning properly and the sudden acceleration were interrupted every time the brake pedal was depressed. Given the absence of this information and the uncertainty as to the context of Pope's comment, we do not view this isolated portion of Pope's

testimony as discrediting other testimony in the record concerning the detrimental effect of pumping the brakes on the ability to stop a vehicle accelerating at full throttle.

c. The Dump Valve [**41]

The district court also relied on a second statement by Pope as establishing that any sudden acceleration would have been prevented or terminated by the Aerostar's dump valve. *Jarvis*, 69 F. Supp. 2d at 597-99. When read in context, this statement does not support the determinative weight assigned by the district court. The court called attention to the fact that Pope agreed that, assuming the dump valve was working properly, "if the brakes were applied at all, the dump valve would have been open." This evidence, the district court noted, "undermines plaintiff's own version of the accident, which was that she started the car with her foot on the brakes, and that with her foot on the brake, the car accelerated." *Jarvis*, 69 F. Supp. 2d at 597. In his testimony, however, Pope qualified this statement as contingent upon the assumption that Jarvis, when starting the van, had depressed the brake pedal far enough to engage the brakes. The proceeding exchange during cross-examination provides the necessary background for his remarks.

> Question: If [Jarvis] said she had her foot depressed on the brake and the vehicle took off as she pushed on the [**42] brake and the vehicle was at a standing stop, unless there was something wrong with the [*51] dump valve, do you agree that she was wrong on that?
>
> Pope: She would have been pushing not with her full might at that point?
>
> Question: I'm sorry?

> Pope: I don't believe she was pushing with all her effort at that point. The vehicle would have moved forward, yes.
>
> Question: Sir, if the brakes were applied at all, the dump valve would have been open, wouldn't it?
>
> Pope: Yes.

A fact finder could reasonably conclude from this exchange that Pope was attempting to distinguish between two types of depression of the brake pedal. Jarvis testified that she put her "right foot lightly on the brake" as she started the engine. If Jarvis had not depressed the brake pedal far enough, the dump valve might not have opened, and the Aerostar could have accelerated suddenly as Jarvis claimed. This light application of the brakes is distinguished in Jarvis's testimony from her later act of placing both feet on the brake pedal and depressing it with considerable force after the vehicle began to accelerate, an action that would have opened the dump valve, assuming that it was functioning properly. [**43]

The district court also noted that Pope had agreed on cross-examination that if Jarvis "was pumping the brake under ordinary pumping, the dump valve would have remained open, and the vehicle would have stopped." *Jarvis*, 69 F. Supp. 2d at 598. On this basis, the court concluded that "Pope's testimony . . . totally undermined Sero's hypothesis that this accident occurred because plaintiff pumped the brakes rather than applying steady pressure." *Id.* As in Pope's testimony discussed above concerning the vacuum reservoir, Pope was not asked to comment on the interaction between a properly functioning dump valve, the decrease in vacuum pressure when pumping the brakes, and the sudden acceleration described by Sero. The

parties appear to agree that every time the brake pedal was released in the pumping action even a properly functioning dump valve would close and allow the Aerostar suddenly to accelerate anew under Sero's theory.

Finally, as previously emphasized, all of this testimony concerning the dump valve presupposes that it was functioning properly at the time of Jarvis's accident. If the dump valve had malfunctioned, the sudden acceleration described by Sero [**44] would have continued, despite Jarvis's depressing the brake pedal, even with both feet applying considerable force. DeClercq, Ford's expert, testified that he tested the dump valve after the accident and found that it functioned properly at that time. Undeveloped in the record, however, is discussion of the possibility that a defect in the dump valve could cause it to malfunction in a manner that would not have been evident upon DeClercq's later examination.

Examining the record as a whole, and construing the evidence in the light most favorable to Jarvis, we cannot say, as a matter of law, that the fact that the Aerostar was equipped with a dump valve discredits Sero's testimony in the manner found by the district court.

d. Ford's Theory of the Accident

The district court also found that Ford had "proffered an alternative scenario that was consistent with the evidence offered by third parties and received support from plaintiff's own witness Pope and the NHTSA governmental study." *Jarvis*, 69 F. Supp. 2d at 602. Ford's scenario suggests that Jarvis, unfamiliar with her new minivan, started it

> unaware that her father had set the parking brake . . .,

> put [**45] her foot on the accelerator thinking it to be on the brake, and was startled when the engine started to race against the force of the parking brake. Continuing to believe that her foot was on the brake and not on the accelerator, plaintiff was unable to stop the car.

Id.

The record as a whole, viewed in the light most favorable to Jarvis, supplies little evidence to support Ford's theory of the accident. While we agree that some evidence in the record is consistent with this theory, judgment as a matter of law demands far more. *See* Fed. R. Civ. P. 50(a) (requiring for judgment as a matter of law that "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party on that issue"). Balancing the evidence that supports Jarvis's sudden acceleration theory against the evidence that calls this theory into question, we do not find the evidence so favorable to Ford as to warrant judgment as a matter of law. To demonstrate this, we begin by analyzing the evidence that the district court collected in support of Ford's theory.

[*52] *The Parking* [**46] *Brake.* The district court stated that Jarvis's father testified "that he set the parking brake. " *Jarvis*, 69 F. Supp. 2d at 602. This misconstrues the record. Jarvis's father, who had been the last one to use the van before the accident, testified that although it was his "normal habit" to put on the parking brake, particularly when it was on a slight incline, he had "no memory of it as such" in this case. When asked specifically whether he had set the brake before the accident, he answered, "I'm not certain I put it in with the parking brake on."

The Brake Light. The district court indicated that Jarvis testified

"that she saw the word 'brake' lighted on the dashboard, which according to Pope means that the parking brake is set." Id. at 603. This reading of the record fails to construe the facts in favor of Jarvis as required when ruling on a motion for judgment as a matter of law. Jarvis testified that she saw a white or light yellow light illuminated high on the left of the dashboard and stated, "as I'm recalling[,] it said brake." Asked specifically if she had seen a red light illuminated on the panel from the beginning to the end of [**47] the incident, she answered no. Pope testified that the Aerostar had two instrument panel lights related to the braking system. The parking brake light, located on the right lower portion of the dash, was red and said "brake." The rear anti-lock brake light, located on the upper left corner of the dash, was amber and would be illuminated for two seconds after the ignition is turned on and the van moves forward while the system reviews its components. Although Jarvis's statement that the light said "brake" is consistent with the parking brake being set, the placement of the light, its color, and the fact that it was not illuminated during the course of the entire incident all indicate that Jarvis saw the rear anti-lock brake light, not the parking brake light, illuminated.

The Speedometer. The district court noted that the fact that Jarvis saw the speedometer "going up" was inconsistent with DeClercq's testimony that a loose ground wire - required under Sero's theories - would have caused the speedometer to read zero during the sudden acceleration. *Id.* Jarvis did not present any evidence to rebut DeClercq's claim on this matter.

The Rear Brake Lights. The court also called [**48] attention to Joanne Valentine-Simonian's testimony that "she saw no rear brake lights illuminated on plaintiff's vehicle when it passed her." *Id.* This statement fails to provide the context for Valentine-Simonian's statement, which affects its reliability. Valentine-Simonian testified that she ran toward the woods when she saw

the Aerostar moving quickly down the road in her direction and then looked back to see the van pass, acknowledging that she had "jumped" out of the way.

The Absence of Skid Marks. A police officer investigating the accident testified that he saw no skid marks on the gravel driveway. This evidence, according to the district court, showed that Jarvis had not placed her foot "forcefully" on the brake. *Id.* As discussed above, however, the depletion of the brake vacuum reservoir by Jarvis's pumping the brakes would have resulted in diminished braking power regardless of the force with which Jarvis depressed the brake pedal. Pope suggested that the depletion of the vacuum reservoir by Jarvis's pumping the brakes could explain in an absence of skid marks. Moreover, Pope testified that under Ford's theory that the parking brake was on and Jarvis had pumped [**49] the accelerator instead of the brake, "it's possible that [the Aerostar] would have left skid marks. "

[*53] *The Engine Racing.* The court observed that, according to Pope's testimony, if the parking brake were on, pumping the accelerator "would have resulted in the engine racing sound that plaintiff and Valentine-Simonian reported." *Id.* While true, the sound of the engine racing is equally consistent with the sudden acceleration explained by Sero's theory.

On the same topic, the court noted that Pope agreed that the cessation of the revving sound described by Valentine-Simonian "could have indicated that plaintiff had taken her foot off the accelerator . . ., which would also explain the slowing of the vehicle." *Id.* Again, while true, the same evidence is equally consistent with Jarvis's testimony that she was pumping the brake.

Jarvis's Ability to Stop the Aerostar. The district court claimed

that the testimony supported the conclusion that Jarvis would have been able to stop the Aerostar if she had pumped the brakes. *Id.* As discussed above, the pumping action itself could have depleted the vacuum reservoir, diminishing Jarvis's ability to stop the vehicle. [**50]

The "Park" Mechanism. The district court also noted Jarvis's testimony that she recalled the Aerostar being in "park" when it accelerated. *Id.* at 597 n.31. All parties agree, however, that the Aerostar did accelerate. Therefore, either Jarvis was mistaken that the Aerostar was in "park" when it accelerated, or the "park" mechanism failed. Either way, the reason for the acceleration and Jarvis's inability to stop the Aerostar is unaffected. Furthermore, Ford's explanation for the accident would be similarly undermined by testimony that the Aerostar was in "park" when it accelerated, rendering this issue even less significant.

The NHTSA Report. Finally, the district court stated that "the reasonableness of Ford's position was supported, both generally and in certain specifics" by the NHTSA report. *Id.* We agree, however, with the district court's earlier conclusion following the *Daubert* hearing that differing conclusions in the NHTSA report did not affect the admissibility of Sero's theories to prove the cause of Jarvis's accident. *Jarvis*, 1999 U.S. Dist. LEXIS 10041, 1999 WL 461813, at *9. The weight given to conclusions in the NHTSA [**51] report, as compared to those of Sero, was a matter for the jury to decide.

The district court, meanwhile, failed to discuss the evidence in the record that weighs heavily against Ford's theory of driver error. Ford's theory that Jarvis had the parking brake on and applied her foot to the accelerator instead of the brake is irreconcilable with Jarvis's testimony that she began with her foot "lightly" on the brake and that the Aerostar's acceleration

was sudden. If her foot was placed "lightly" on the accelerator instead of the brake, and the parking brake were on, the Aerostar would have accelerated slowly, if at all. Jarvis on the other hand, testified that the Aerostar "took off." Another weakness of Ford's theory is that it assumes driver error not only as to which pedal Jarvis depressed but also as to the effect of each stroke of the pedal. Under Ford's theory, Jarvis would have felt the Aerostar *accelerate* with each application of the pedal, and slow each time she lifted her foot from the pedal. Ford's theory asks us to believe that Jarvis repeatedly applied force to the pedal without understanding the effect of her actions. Finally, Ford's theory is unable to account for [**52] Jarvis's claim that she depressed the pedal with both feet. As part of the accident reconstruction, Jarvis was asked to sit in the Aerostar and to place both feet on the accelerator. She was able to do so only by placing one foot on top of the other. When asked to do the same with the brake pedal, she found that it accommodated both feet. [*54] The jury viewed photos taken for purposes of this litigation showing Jarvis sitting in the Aerostar at the accident site. The photos also demonstrated that, when asked to put both feet on the accelerator, Jarvis had one foot placed over the other.

In sum, we find the ultimate issue of Ford's negligence to be a jury question. Ford did not present evidence that conclusively demonstrated, as a matter of law, that Jarvis's accident did not occur because of a defect in the Aerostar's cruise control mechanism. Jarvis's testimony, the testimony of other Aerostar owners who had similar experiences, and evidence of hundreds of other reported cases of sudden acceleration in Aerostars, combined with an expert's scientific explanation of how the cruise control may have malfunctioned and of an inexpensive remedy, were all found admissible by the district court. [**53] Together, this evidence provided the jury with a sufficient evidentiary basis to reasonably conclude that the cruise control

mechanism had been defectively designed.

B. Ford's Inconsistent Verdict Motion

1. Background

Immediately after the jury returned its verdict but before the jury was excused, Ford moved for relief on the basis of an inconsistent verdict. The district court agreed with Ford that the jury verdict was "irreconcilable," *Jarvis*, 69 F. Supp. 2d at 588, but did not reach the issue of what relief would be appropriate because, as discussed above, it found the evidence insufficient to sustain a verdict for Jarvis and granted Ford's motion for judgment as a matter of law.

We find that any potential error related to the jury instructions and verdict sheet, and not to the jury's general verdicts and that, therefore, Ford's objection needed to conform to the strictures of Fed. R. Civ. P. 51. We hold that the district court, in finding that Ford had not waived its objection, erred, as a matter of law, in not applying the Fed. R. Civ. P. 51 requirements that [**54] any objection must "state distinctly the matter objected to and the grounds of the objection." Applying this legal standard, we find that Ford's pre-trial statement that the court should charge either negligence or strict liability, but not both, failed to alert the court to the precise nature of Ford's objection and its legal grounding. Finding no "fundamental error" in the instructions, we order the district court to reinstate the jury verdict.

The charge given to the jury explained that

> "plaintiff brings this action on the basis of two theories of liability: Negligence and strict liability. . . .

. . . .

> If you find that the cruise control system in the Aerostar was not defective *and* that Ford was not negligent, you will not reach the issues raised in the remainder of the charge.
>
> If, however, you find *either* that Ford was negligent in the design of the 1991 Aerostar cruise control system, *or* that the 1991 Aerostar cruise control system was itself defective, you must next consider whether that negligence or defect was a substantial factor in causing plaintiff's injury. . . . If you find that *neither* defendant's negligence *nor* the cruise control [**55] defect was a substantial factor in causing the injury, then plaintiff may not recover.
>
> If you find that *either* defendant's negligence *or* the cruise control defect was a substantial factor in causing plaintiff's injury, you will proceed to consider comparative fault. . . .
>
> If you find *either* defendant's negligence *or* the cruise control defect was a substantial factor in causing plaintiff's [*55] injury, you must next consider whether the plaintiff was also negligent. (emphasis added).

From this charge, it is abundantly clear that the jury was instructed that it could find Ford liable under theories of *either* negligence *or* strict liability or both. The verdict sheet given to the jury accurately reflected this by indicating, after question

1(a) concerning strict liability,[11] "IF YOUR ANSWER TO QUESTION 1(a) IS 'NO', THEN PROCEED TO QUESTION 2(a)." Question 2(a), concerning negligence, asked, "Do you find by a preponderance of the evidence that the defendant Ford Motor Company was negligent in the design of the cruise control system in the 1991 Ford Aerostar? (Plaintiff's Burden of Proof)," followed by blanks to check either "yes" or "no." The jury checked the [**56] "no" blank in response to question 1(a), and "yes" in answer to question 2(a).

After the jury returned its verdict, and as the court was thanking its members for their service, counsel for Ford stated:

> Your Honor, . . . I must make a motion for an inconsistent verdict before the jury is dismissed and I'm doing that at this point in time. And the basis for that motion is by finding "no" on Question 1A that the cruise control was not designed in a defective manner, the jury cannot then find that Ford was negligent in the design of the cruise control system. The opposite would be so, but it can't be so in that direction.

Counsel for Jarvis argued that the verdict was rendered in accord with the jury charge. The court responded that it had believed [**57] it necessary to charge both theories of liability, despite its reservations, because it found no case law permitting the court to eliminate one of the claims from the charge. The

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[11] The first question asked, "1(a) Do you find by a preponderance of the evidence that the cruise control system of the 1991 Ford Aerostar was designed in a defective manner? (Plaintiff's Burden of Proof)," followed by blanks to check either "yes" or "no."

court then refrained from dismissing the jury and asked for written submissions from the parties on the issue of the inconsistency in the verdict. The court subsequently granted Ford's motion, finding the verdict inconsistent. *Jarvis*, 69 F. Supp. 2d at 586, 588.

Ford argues that it did not waive its objection to any inconsistency in the verdict because (1) it objected to the verdict after it was announced but before the jury was released; (2) counsel for Jarvis acknowledged that Ford's motion was timely; and (3) Ford had voiced its opposition to charging both theories before trial. The district court ruled only on the third contention, finding that Ford's pre-trial statements adequately preserved its objection. In reviewing *de novo* the district court's choice of legal standard, we hold that it did not apply the correct standard in ruling that Ford was relieved from the obligation of presenting [**58] a more explicit, precise, and reasoned objection before the jury deliberated. Applying the correct standard, we find that Ford did not satisfy the requirements of Fed. R. Civ. P. 51. Ford's first two contentions, not addressed by the district court, both fail because they appear to rely on Fed. R. Civ. P. 49, which is inapplicable in this case.

2. Fed. R. Civ. P. 49

On appeal, Ford first contends that its objection was timely because it was made before the jury was released. Although Ford cites no authority for this proposition, we assume that it relies on Fed. R. Civ. P. 49, governing special verdicts and interrogatories. Under Rule 49(a), a "court may require a jury to return only a special verdict in the form of a special [*56] written finding upon each issue of fact," with objection to the omission of any issue of fact made before "the jury retires." Fed. R. Civ. P. 49(a). This rule does not apply when, as here, the jury is required to make determinations not only of issues of fact but

of ultimate [**59] liability. *Cf. Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 349 (2d Cir. 1999) (refusing to apply Fed. R. Civ. P. 49(a) when "the alleged error was not the omission of an issue from the verdict form" but rather in the "*instruction* provided on the verdict form") (emphasis in original); James Wm. Moore et al., *Moore's Federal Practice* ¶ 49.02[2][b] (3d ed. 1998) ("Pursuant to Rule 49(a), the jury returns its special verdict in the form of written answers to separate questions concerning specific factual issues. The trial court then applies the law to those answers and enters judgment accordingly."). The dissent maintains that the verdict form may be seen as soliciting special verdicts under Rule 49(a), noting that the form was actually labeled "special verdict." *Post*, at **[5]**. We have held, however, that where a jury is instructed to apply legal principles and assign liability, "the answers to the questions submitted to the jury are not special verdicts, despite the use of those words in the title appended to the form, and Rule 49(a) therefore does not apply." *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 54 (2d Cir. 1992). [**60]

Neither is Ford's objection proper pursuant to Fed. R. Civ. P. 49(b). Under Rule 49(b), a "court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed. R. Civ. P. 49(b). If the answers to the interrogatories are "inconsistent with each other and one or more is likewise inconsistent with the general verdict," the court may return the verdict to the jury or order a new trial. *Id.* Although an objection under Rule 49(b) to answers to the interrogatories may be timely if made before the jury is dismissed, Rule 49(b) is inapplicable here because the alleged inconsistency was not among responses to interrogatories regarding "issues of fact, " but between two

general verdicts based on different legal theories. The dissent contends that these cannot be general verdicts, because a general verdict asks only the question of ultimate liability, and there cannot be more than one question of ultimate liability in a single cause of action. *Post*, at ***[4]*** [**61] . However, as the dissent appears to concede, *id.* at ***[4]*** n.1, and as Ford seems to concede by not invoking Rule 49, our precedent clearly holds otherwise. *See Lavoie*, 975 F.2d at 54 ("The alleged inconsistency to which defendant points is between two *general verdicts* on different legal theories and not between a general verdict and responses to interrogatories. Hence, the instruction given to trial courts under Rule 49(b) has no application.") (emphasis in original).

The statement by Jarvis's counsel that the "motion is not untimely," therefore, is of little consequence. Though a motion under Fed. R. Civ. P. 49 might have been *timely*, it cannot, as a matter of law, provide any relief for a party challenging a conflict between general verdicts based on an instruction given in the jury charge and repeated on the verdict sheet.

3. Fed. R. Civ. P. 51

Objection to an inconsistency between two general verdicts that is traced to an alleged error [**62] in the jury instruction or verdict sheet is properly made under Fed. R. Civ. P. 51. Yet to avail itself of relief under this Rule, a party must object before the jury retires to deliberate. *See* Fed. R. Civ. P. 51 ("No party [*57] may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict."). We have previously emphasized that "failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection. . . . Surely litigants do not get another opportunity to

assign as error an allegedly incorrect charge simply because the jury's verdict comports with the trial court's instructions." *Lavoie*, 975 F.2d at 55; *see also Barrett*, 194 F.3d at 349 (applying Rule 51 to an objection to an instruction provided on the jury form); *cf. Play Time, Inc. v. LDDS Metromedia Communications, Inc.*, 123 F.3d 23, 29 n.6 (1st Cir. 1997) ("The Rule 51 standard applies to the jury charge and any special verdict form."). In this case, Ford objected to the jury considering its liability [**63] under a negligence theory in question 2(a) after the jury had found Ford not strictly liable under question 1(a). This was explicitly permitted by the jury form that required that "IF YOUR ANSWER TO QUESTION 1(a) IS 'NO', THEN PROCEED TO QUESTION 2(a)." As noted above, the same procedure was required by the charge to the jury instructing that Ford's ultimate liability depended on the jury's finding "*either* that Ford was negligent in the design of the 1991 Aerostar cruise control system, *or* that the 1991 Aerostar cruise control system was itself defective." (emphasis added). We find, therefore, that Ford's objection made after the jury returned the verdicts was untimely.

Ford also contends that it did not waive its objection to verdict inconsistency because, before the trial began, it "made clear its position that the case should not go to the jury on both theories" of liability. Ford claims that once the district court, knowing Ford's preference for charging one but not both theories of liability, decided to send the case to the jury under theories of both negligence and strict liability, Ford was not required to object to the jury instructions or the verdict sheet because [**64] it was reasonable to conclude that further objection would be unavailing, echoing the district court's finding that no further objection was necessary. We disagree. At no point in its ruling on Ford's preservation of its objection did the district court consider whether Ford had satisfied the appropriate legal standard that Ford "state distinctly the matter objected to and

the grounds of the objection." Fed. R. Civ. P. 51. We find that Ford did not, and note that the district court's own comments lead to the same conclusion.

a. Factual Background

In their proposed jury instructions submitted prior to trial, both Ford and Jarvis requested that the court charge the jury on both negligence and strict products liability.[12] After receiving the parties' proposed requests to charge, the judge wrote to the parties asking them to "clarify their positions with respect to the appropriate causes of action in this case." Letter from Judge Buchwald to the parties, July 6, 1999, at 2. The court inquired, *inter alia*, whether "it would be sensible" to follow the approach taken in *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134-35 (2d Cir. 1999), "in which the plaintiff [**65] [*58] withdrew his negligence cause of action as duplicative of his strict liability claim," stating that the court's research "indicates a substantial overlap in the elements of negligence and strict liability claims for defective design." Letter from Judge Buchwald to the parties, July 6, 1999, at 1-2.

Counsel for Jarvis responded that "we do not regard the negligence claim and the strict liability claim as [**66] duplicative but, rather, we regard them as distinct, unlike the

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[12] Ford requested a standard negligence charge, following New York Pattern Jury Instruction 2:120, asking the jury to decide whether Ford had "failed to use reasonable care in designing or making the Aerostar van," and a standard strict liability charge, following New York Pattern Jury Instructions 2:141, stating that "[a] manufacturer who sells a product in a defective condition is liable for injury which results from use of the product when the product is used for its intended or reasonably foreseeable purpose."

apparent factual situation referenced in *Pahuta v. Massey-Ferguson, Inc.*" Letter of George N. Tompkins, Jr. to Judge Buchwald, July 6, 1999, at 2. The letter explained that "this claim raises the question whether the defendant Ford acted reasonably in selecting the design for the Aerostar cruise control system, whereas the strict liability claim focuses upon the question whether the Aerostar cruise control system itself was unreasonably dangerous." *Id.*

Counsel for Ford, in its letter to the district court, responded only that "we have read the *Pahuta* case and agree with the Court that the Court should charge either negligence or strict products liability, but not both." Letter of Brian P. Crosby to Judge Buchwald, July 7, 1999, at 1. The letter offered no legal argument or citation to any other authority as to why both theories could not be charged. *Id.* The *Pahuta* case itself does not state that the two causes of action are necessarily duplicative. There, we mentioned in a footnote merely that "at the charging conference, *Pahuta* abandoned a negligence cause of action as duplicative of his [**67] strict liability claim." *Pahuta*, 170 F.3d at 134 n.7. The parties appear to agree, with good reason, that our footnote in *Pahuta* did not decide the issue of the potential overlap of the two theories of liability for all future design defect claims brought under New York law. Tellingly, in arguing on appeal that the causes of action are duplicative as a matter of law, Ford makes no mention of *Pahuta*.

A few days after this exchange of letters, the parties met with Judge Buchwald in a pre-trial conference. There, Judge Buchwald began the discussion of the jury charge by stating: "I don't believe that there's any authority that I'm aware of that would permit a court over the objection of a plaintiff to not charge negligence or not charge strict liability if the plaintiff

wants them both charged. So since you want them both charged, I'll charge them." Pre-trial conference, July 12, 1999 tr. ("Pre-trial tr."), at 27-28. Next, Judge Buchwald addressed a separate issue, raised in the prior correspondence, of Jarvis's failure to warn claim and whether it was part of either the negligence or strict liability claims. Pre-trial tr. at 28. In response, a speaker unnamed [**68] in the transcript but identified by Jarvis as "counsel for Ford"[13] stated: "To me, it seems that the claim of the plaintiff here is one of negligence and certain product liability." Later discussion of the duty to warn contains the comment by an unidentified speaker, again identified by Jarvis as "counsel for Ford" as first stating: "That gets negligence out of the case, as I see it. I mean, it's a product liability theory, plain and simple." Pre-trial tr. at 36. The court responded, "So you don't want me to charge negligence?" *Id.* The speaker, identified by Jarvis as "counsel for Ford," answered: "Well, we're going to reserve [*59] on that. *We want you to leave negligence in for now.*" *Id.* (emphasis added). The judge agreed. *Id.*

After the charge to the jury, Ford did not object to instructing the jury on both theories of liability or to the instruction in the jury charge and on the verdict sheet that the jury could find Ford negligent but not strictly liable. The district court, in later finding that Ford had not waived its objection, stated that:

> Although it is true that defense counsel did not

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[13] The transcript of the pre-trial conference labels this individual only as an "UNIDENTIFIED SPEAKER." Pre-trial tr. at 30. The copy of the transcript supplied to this Court by Jarvis, however, contains handwritten notations identifying this speaker as "counsel for Ford." *Id.*

> specifically object to our charge and special verdict questions on the ground that they could lead to inconsistent results, we cannot find a waiver because the defense's fundamental position on this issue had previously been expressed to the Court and, after our ruling at the pretrial conference, it was reasonable for defendant to conclude that future efforts to object would be unavailing.

Jarvis, 69 F. Supp. 2d at 589.

Future efforts to object were, however, availing. After the jury returned its verdict, counsel for Ford objected, and, after explaining the legal basis for its claim that the two causes of action were duplicative, the district court agreed. *Id.* Citing *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 662 N.E.2d 730, 735-36, 639 N.Y.S.2d 250 (N.Y. 1995), the court found [**70] a "functional equivalence" between the negligence and strict liability design defect claims. As a result, the court concluded that "defendant's position that a finding of no defect and a finding of negligence are inconsistent as a matter of law in a product liability case is well supported." *Jarvis*, 69 F. Supp. 2d at 586. Later reflecting on what had occurred before and during the trial, the district court stated:

> While we readily admit that our pretrial research failed to learn of the wide acceptance of the equivalency of negligence and strict liability claims in design defect cases, we remain puzzled why this overlap was not brought to our attention given that defendant's attorney was also of counsel to defendant Ford in the *Denny* case. Although we are lacking in hard evidence, we similarly doubt whether plaintiff's three experienced counsel shared our unfamiliarity with this case law.

> Thus, we suspect that both sides elected for strategic reasons to refrain from informing us of the overlap and potential for inconsistent verdicts. Regardless, we analyze this case in conformity with the now-revealed governing case law.

Jarvis, 69 F. Supp. 2d at [**71] 587 n.8.

b. Standard of Review for Waiver Finding

We review *de novo* the district court's interpretation of the legal standard for waiver under Fed. R. Civ. P. 51. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982) (stating that "if a district court's findings rest on an erroneous review of the law, they may be set aside on that basis" and are not given the deference accorded to findings reviewed for clear error); *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 468 (2d Cir. 1998) (reviewing *de novo* district court's legal interpretation of civil procedure rule). We hold that the district court failed to apply the correct legal standard in ruling that the expression of Ford's "fundamental position" sufficed to preserve its objection to the jury instruction and verdict sheet. The district court neither mentioned Fed. R. Civ. P. 51 or its requirements nor applied them in substance. Applying the requirements of Fed. R. Civ. P. 51 *de novo*, we find that Ford waived any objection.

[*60] c. The Law of Waiver [**72] Under Fed. R. Civ. P. 51

Under Rule 51, an objection must "state distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. "The purpose of the Rule is to allow the trial court an opportunity to cure any defects in the instructions before sending the jury to deliberate." *Fogarty v. Near N. Ins.*

Brokerage, Inc., 162 F.3d 74, 79 (2d Cir. 1998). The "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119, 87 L. Ed. 645, 63 S. Ct. 477 (1943); *see also Martin v. United Fruit Company*, 272 F.2d 347, 349 (2d Cir. 1959) (requiring that an objection "be specific enough to inform the trial judge of his alleged error so that he may have an opportunity to correct it") (internal quotation marks omitted).

The "fundamental" nature of Ford's position that the court should have charged negligence or strict liability but not both is called into doubt by Ford's own recommendation, made only a few days before [**73] taking this position in correspondence with the court, that the district court charge both theories. Ford's position that it believed that one but not both causes of action should be charged was taken only after Judge Buchwald asked the parties whether "it would be sensible" to follow the approach taken in *Pahuta*, 170 F.3d at 134-35, "in which the plaintiff withdrew his negligence cause of action as duplicative of his strict liability claim." *Id.* Counsel for Jarvis declined the offer, claiming that *Pahuta* was limited to its facts and that, in this case, the two theories of liability were not duplicative. Letter of George N. Tomkins, Jr. to Judge Buchwald, July 6, 1991, at 2.

The statement by Ford that "we have read the *Pahuta* case and agree with the Court that the Court should charge either negligence or strict products liability, but not both," failed to state distinctly either "the matter objected to" or "the grounds of the objection." Fed. R. Civ. P. 51. The specific objection that Ford asks this Court to read into its pre-trial correspondence is that the jury's finding that the cruise control system of the 1991 Ford Aerostar was not designed in a [**74] defective manner presumes that Ford was not negligent in the design of the cruise

control system. Ford's statement that either negligence or strict liability, but not both, should be charged, does not distinctly state this objection. Ford's current contention is not that it was error to charge two theories of liability but rather that, after determining that Ford was not strictly liable, the jury should not have considered whether Ford was negligent. [14] Ford's conduct at the pre-trial conference, if anything, obscured any objection it might have made in its correspondence with the court. At the conference, the speaker identified by Jarvis as "counsel for Ford" explained that "it seems that the claim of the plaintiff here is one of negligence and certain product liability." After the court later asked, "so you don't want me to [*61] charge negligence?" the speaker, identified again by Jarvis as a counsel for Ford, responded, "Well, we're going to reserve on that. We want you to leave negligence in for now." Pre-trial tr. at 36. Accordingly, Ford did not distinctly state "the matter objected to." In fact, it appears to have asked the court to leave both causes of action in the jury charge. [**75]

Neither did Ford state distinctly "the grounds of its objection." In the pre-trial correspondence and conference, Ford made no legal argument for charging only one cause of action outside of the passing reference to our footnote in the *Pahuta* case. In that

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[14] We further note that Ford, in making its objection before the jury was dismissed, assigned error only to the jury's finding negligence without strict liability, not to the possible finding of strict products liability without negligence. Ford argued to the district court that "by finding 'no' on Question 1A that the cruise control was not designed in a defective manner, the jury cannot then find that Ford was negligent in the design of the cruise control system. The opposite would be so, but it can't be so in that direction." Ford's pre-trial preference for charging one, but not both, causes of action fails to capture this distinction, providing further evidence that Ford's statement failed to state distinctly the grounds of its objection.

footnote, [**76] we mentioned merely that the plaintiff had voluntarily withdrawn a negligence charge. *Pahuta*, 170 F.3d at 134 n.7. Ford cited no authority to show why the district court should find the negligence cause of action duplicative of the strict liability claim in this case. In recalling how it came to charge the jury under both theories, the district court remarked simply that the plaintiff had asked for the charge and that in one case, presumably *Pahuta*, "the plainiff[] had agreed to drop one of the claims." After the verdict, in ruling on Ford's motions, the district court rebuked counsel for not calling its attention earlier to the relevant legal authority in New York regarding the similarities between negligence and strict liability for product defects, indicating its suspicion that it appeared that this failure was "a tactical decision" made "for strategic reasons to refrain from informing us of the overlap and potential for inconsistent verdicts." *Jarvis*, 69 F. Supp. 2d at 587 n.8. In this regard, it appears that the district court agreed that Ford did not distinctly state "the grounds of its objection." Fed. R. Civ. P. 51.

On appeal, Ford [**77] claims that there was no need to object once the district court had announced at the pre-trial conference that it would charge both theories of liability because any further objection would have been futile. The credibility of Ford's assertion is undermined by Ford's later objection, demonstrating that Ford did not feel constrained at all. Far from futile, this later objection, now accompanied by a reasoned legal argument as to the potential overlap of the two causes of action, persuaded the district court that it should not have charged the jury on both theories. Ford cannot show the futility of future objection because it has not shown that "the trial court had been clearly apprised of the possibility of error and had disagreed, or had been given an opportunity to correct the error and had declined to do so." *Fogarty*, 162 F.3d at 80 (finding waiver after "court explicitly asked for both an objection and alternative language, and received, respectively, a vague answer and silence

in response"). Having failed to provide the district court with an adequate opportunity to [**78] consider and deny the objection, a party cannot later argue that any further objection would have been futile. The case Ford cites to support its proposition that objection is not waived if the district court had previously rejected its position, *Anderson v. Branen*, 17 F.3d 552 (2d Cir. 1994), presented a very different factual situation. There, the plaintiffs requested a duty to intercede charge, which was subsequently "expressly raised and discussed at length" at the charge conference. *Id.* at 557. The court agreed to give the charge, but then retracted it and stated to counsel "that if this is something that we raised the other day, you don't need to repeat yourself." *Id.* Under these circumstances, we found that further objection to the charge was unnecessary. *Id.* Because Ford failed to raise expressly its current objection, and thus the district court was never given the opportunity to consider its argument, Ford [*62] cannot claim that future objection would have been unavailing.

In making this argument, Ford relies on the finding of the district court that "although it is true that defense counsel did not specifically object to our charge [**79] and special verdict questions on the ground that they could lead to inconsistent results," Ford's "fundamental position . . . had previously been expressed to the Court" and therefore "it was reasonable for defendant to conclude that future efforts to object would be unavailing." *Jarvis*, 69 F. Supp. 2d at 589. As discussed above, Fed. R. Civ. P. 51 requires more than the disclosure of a "fundamental position" desiring one jury charge over another. The federal rules instead require that Ford "state distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. Finding that the district court failed to apply this standard, we do not owe deference to the district court's conclusion. *See Pullman-Standard*, 456 U.S. at 287 ("If a district court's findings rest on an erroneous review of the law,

they may be set aside on that basis.").

For the reasons stated, under the principles of Rule 51 Ford has waived its objection to verdict inconsistency. As discussed above, we decline the dissent's invitation to ignore our jurisprudence [**80] in this area and shoehorn this case into Rule 49 in order to avoid this result. The policy concerns behind the dissent's dissatisfaction with what it perceives as inconsistent verdicts are no more compelling than those behind the principle of waiver. In this ten-year litigation, the issue of the jury charge was litigated extensively. Ford asked for this jury charge, presumably for strategic reasons, and was well apprised of the law of waiver. To excuse Ford from the well-established rules of waiver would permit precisely the sort of "sandbagging" that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve.

4. Fundamental Error

Although Ford has not requested that we do so, this Court may review jury instructions and verdict sheets for "fundamental" error even when a litigant has not complied with the Fed. R. Civ. P. 51 objection requirements. *See Shade v. Housing Auth. of New Haven*, 251 F.3d 307, 312 (2d Cir. 2001). Fundamental error is more egregious than the "plain" error that can excuse a procedural [**81] default in a criminal trial, *see id.*, and is "so serious and flagrant that it goes to the very integrity of the trial." *Id.* at 313 (quoting *Modave v. Long Island Jewish Medical Ctr.*, 501 F.2d 1065, 1072 (2d Cir. 1974)). We have found relief from fundamental error to be warranted when the jury charge "deprived the jury of adequate legal guidance to reach a rational decision." *Werbungs v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1026 (2d Cir. 1991). Because the degree of overlap between negligence and strict liability for design defects is unsettled under New York law, the integrity of the trial was not

endangered by the jury instructions and verdict sheet in this case.

Ford, on appeal, contends that "under New York law, negligence and strict products liability claims for design defects are functionally the same and virtually indistinguishable."[15] Neither this Court nor the New York Court of Appeals has [*63] squarely endorsed such a rule. Traditionally, the New York Court of Appeals has held that negligence and strict liability provide [**82] distinct forms of relief in products liability. *See Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 277, 373 N.Y.S.2d 39 (N.Y. 1975) ("Depending on the factual context in which the claim arises, the injured plaintiff, and those asserting derivative claims, may state a cause of action in contract, express or implied, on the ground of negligence, or, as here, on the theory of strict products liability.").

To be sure, more recently the New York Court of Appeals, in discussing the historical development of the law of products liability, quoted approvingly from a law review article in stating that "'in general, . . . the strict liability concept [**83] of "defective design" [is] functionally synonymous with the earlier negligence concept of unreasonable designing.'" *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 662 N.E.2d 730, 735, 639 N.Y.S.2d 250 (N.Y. 1995) (quoting Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58

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[15] As noted above, Ford's objection after the jury returned its verdict claimed only that there was no strict liability without negligence, but not the converse. For these purposes, however, we need not distinguish between the more narrowly framed objection after the jury verdict and the more sweeping statement made on appeal.

N.Y.U. L. Rev. 796, 803 (1983)). This statement was, however, dicta. The *Denny* court decided only that strict liability and breach of implied warranty claims are not identical under New York law, that the latter is not necessarily subsumed by the former, and that a jury's finding of no product defect was reconcilable with its finding of breach of warranty. *Denny*, 662 N.E.2d at 739.[16]

The statement that "in general" the relevant concepts are "functionally synonymous" is further tempered by the court's more reserved conclusion later in the opinion that "the adoption of [a] risk/utility balance as a component of the 'defectiveness' element has brought the inquiry in design defects cases closer to that used in traditional negligence cases, where the reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors." *Id.* at 738. In addition, in responding to the dissent's urging that the strict liability and breach of warranty causes of action can be merged, the *Denny* court pointed to the commentator upon whom the dissent relied as "affirmatively criticizing courts that have failed to separate conceptually the notions of strict liability, negligence, warranty, and absolute liability." *Id.* at 738 (internal quotation marks omitted). We state no opinion as to how we

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[16] The *Denny* opinion itself suggests that dicta in this area may not always be reliable. In *Denny*, the New York Court of Appeals determined that, despite its earlier dicta that "'strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action,'" *id.* at 741 (quoting *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490 (N.Y. 1969)), "nonetheless, it would not be correct to infer that the tort cause of action has completely subsumed the older breach of implied warranty cause of action or that the two doctrines are now identical in every respect." *Denny*, 662 N.E.2d at 734.

might rule if required to decide whether, under New York law, the negligence cause of action in this case was duplicative of the strict liability cause of action and whether the dicta in *Denny* accurately reflects how the New York Court of Appeals [**85] would rule on the matter. Given the unsettled nature of the law in this area, however, we hold that there was no "fundamental" error in the jury instructions or the verdict sheet.

C. Collateral Source Hearing

Jarvis claims that the district court abused its discretion in granting Ford's motion to reduce the amount of the jury verdict pursuant to N.Y.C.P.L.R. 4545(c) without holding a hearing. We disagree.

[*64] After the jury returned its verdict, Ford moved pursuant to N.Y.C.P.L.R. 4545(c) to reduce the verdict on the basis of collateral disability payments Jarvis had already received and would continue to receive in the future.[17] Jarvis, in response to this request, simply stated that "there is no evidence which would warrant any reduction in the verdict pursuant to C.P.L.R.

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[17] N.Y.C.P.L.R. 4545(c) provides, in pertinent part, that "where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source . . . . If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding."

Ford, in its motion, stated that the "date, time and place of hearing" on the motion should be "determined by the Court."

§ 4545(c)."

At trial, however, Dr. Marcus, Jarvis's expert, testified that the combined value of past and future collateral payments would equal $ 473,469. Jarvis did not object to Dr. Marcus's testifying as to the amount of past and future collateral source payments. In her deposition testimony, Jarvis had confirmed that she was receiving monthly payments from a private disability policy, and, in answer to Ford's interrogatories, she admitted she was receiving long term disability benefits in addition to her Social Security disability payments. Dr. Donald S. Chambers, her treating psychiatrist, testified in detail concerning the significant impairments that Jarvis suffered as a result of the accident and described his expectation for her improvement as "quite low."

In view of the facts in the record, we reject Jarvis's contention that there is "no evidence" to support a reduction in the verdict pursuant to N.Y.C.P.L.R. 4545(c). Concerning the need for further proceedings, we note that on appeal Jarvis has not challenged any particular calculation made by Dr. Marcus nor has she claimed that she has not in the past, or will not continue in the future, to receive the benefits that Dr. Marcus [**87] described. Because on appeal Jarvis has not raised a disputed issue of material fact in opposing the reduction of the verdict by collateral source payments, we find that the district court did not abuse its discretion in not holding further proceedings.

D. Other Issues

Jarvis also contends that the district court erred in dismissing her claim for punitive damages. At oral argument, counsel for Jarvis stated that it would waive further proceedings on punitive damages if we were to reinstate the jury verdict and provide for a fair determination of any collateral source payments. Having reinstated the jury verdict and determined that Jarvis failed to

raise a disputed issue of material fact warranting further proceedings on collateral source payments, we deem that Jarvis has waived any challenge to the dismissal of her claim for punitive damages. Given this resolution of the dispositive issues on appeal, no need exists to reach other issues raised by Jarvis.[18]

CONCLUSION

We reinstate both the jury's verdict that Ford was negligent in the design of the [*65] cruise control mechanism in the 1991 Aerostar and the jury's award of damages. We hold that Ford waived any objection to an inconsistent verdict by failing to object with the requisite specificity to the jury charge or verdict sheet before the jury retired to deliberate. Finally, we affirm the district court's reduction of the jury award pursuant to N.Y.C.P.L.R. 4545(c). Accordingly, we vacate the judgment of the district court and remand with instructions to enter judgment in Jarvis's favor consistent with this opinion.

CONCURBY: VAN GRAAFEILAND (In Part)

DISSENTBY: VAN GRAAFEILAND (In Part)

DISSENT:

VAN GRAAFEILAND, Senior Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's view that the trial court erred in

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[18] These include the district court's (1) dismissal of Jarvis's negligent failure to warn claim; (2) evidentiary rulings; and (3) denial of a request for a hearing pursuant to Fed. R. Civ. P. 60(b).

granting Ford's motion for J.M.O.L. I am convinced, however, that the verdict form was submitted under Fed. R. Civ. P. 49 and Ford's objection thereto, made before the jury was discharged, was timely. Moreover, because entering judgment on a verdict that is irreconcilably inconsistent creates an uncertainty as to the meaning of the verdict that [**89] is fundamentally unacceptable, I dissent from the portion of the opinion that finds that Ford waived any objection to the inconsistency. The proper remedy, in my view, would be a remand for a new trial.

The majority finds that the inconsistency complained of here is "between two general verdicts" and thus, the provisions of Rule 49 do not apply. This reasoning is beyond my ken. A general verdict, by definition, asks "only whether the defendant was liable to the plaintiff, and if so, what damages are awarded." *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 53 (2d Cir. 1992). In other words, a general verdict asks merely the question of ultimate liability. See id. at 54 (verdict form "did not offer the jurors only the ultimate choice normally called for by a general verdict--the defendant is liable to the plaintiff for a specified amount of damages, or the defendant is not liable to the plaintiff"); see also Black's Law Dictionary 1555 (7th ed. 1999) (defining "general verdict" as "verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions").

In contrast, a special verdict "is a term of [**90] art, and properly speaking refers only to special findings regarding factual issues that the court may ask the jury to resolve, or perhaps mixed questions of law and fact, assuming applicable legal standards are charged." *Mfrs. Hanover Trust Co. v. Drysdale Sec. Corp.*, 801 F.2d 13, 26 (2d Cir. 1986), cert. denied 479 U.S. 1066 (1987).

The majority's assertion that the inconsistency in this case was "between two general verdicts" cannot be as that phrase is correctly defined, supra. It is truly axiomatic that **one** cause of action can produce but **one** general verdict. Here, Jarvis, though proceeding on different theories of liability, had but one cause of action against Ford, viz. a cause of action for injuries sustained when her vehicle crashed. Courts everywhere (including New York) recognize this fundamental principle: "Since a plaintiff can have but one recovery for one wrong, he has but a single cause of action and each of the available supporting theories is merely a different count in support of the single claim." *European Am. Bank v. Cain*, 79 A.D.2d 158, 162, 436 N.Y.S.2d 318, 320-21 (1981). See also *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945) [**91] ("It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action."); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321, 71 L. Ed. 1069, 47 S. Ct. 600 (1927) [*66] ("A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong . . . . The facts are merely the means, and not the end.") (internal quotation marks omitted); *Werlein v. City of New Orleans*, 177 U.S. 390, 400, 44 L. Ed. 817, 20 S. Ct. 682 (1900) (different grounds complaining of same basic wrong and fact pattern form one single cause of action); *Saud v. Bank of N.Y.*, 929 F.2d 916, 919 (2d Cir. 1991) ("it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies") (quoting *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d [**92] Cir.) cert. denied 434 U.S.

903, 54 L. Ed. 2d 190, 98 S. Ct. 300 (1977)); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2d Cir. 1989) ("new legal theories do not amount to a new cause of action"); *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985) (same); *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192, 429 N.E.2d 746, 749, 445 N.Y.S.2d 68, 71 (1981) (single "cause of action may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery") (quoting *Reilly v. Reid*, 45 N.Y.2d 24, 29, 407 N.Y.S.2d 645, 379 N.E.2d 172 (1978)); *Payne v. N.Y., Susquehanna & W. R.R. Co.*, 201 N.Y. 436, 441-42, 95 N.E. 19 (1911) (stating in action where plaintiff pleaded three separate legal theories of liability for same injury: "Obviously there is but one primary right, one primary wrong, and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand."); *Bradley v. Condon*, 217 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1961) [**93] ("Though [a] claim is based on two separate legal theories . . . it constitutes but one cause of action . . . . Different legal theories or grounds of liability do not necessarily create different causes of action . . . ."); *Kings County Pharm. Soc'y v. City of New York*, 198 N.Y.S.2d 339, 339 (N.Y. Sup. Ct. 1960) ("If the facts alleged . . . show one primary right of the plaintiff and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action."); Weinstein v. Schwartz, 107 N.Y.S.2d 337, 341 (N.Y. Sup. Ct. 1951) ("Different legal theories or different grounds of liability do not make different causes of action."); *Fontheim v. Fred F. French Inv. Co.*, 102 N.Y.S.2d 589, 591 (N.Y. Sup. Ct. 1951) (same).

Since it is unmistakable that because Jarvis suffered only one set of injuries from one set of facts, she had but one cause of action. That she proceeded on the theories of both strict liability and negligence does not change this. Logically, there could not

possibly have been two separate questions of ultimate liability (the question a general verdict asks) on one single cause [**94] of action. There simply could not have been two general verdicts (consistent or otherwise) in this case, which had only one cause of action. [1]

The only possible interpretation is that the verdict form submitted to the jury was either a general verdict with special interrogatories under Rule 49(b) or a special verdict under Rule 49(a). An easy way of [*67] looking at it is that a general verdict asks merely "who wins?" A special verdict or general verdict with interrogatories asks "why?"

Here, the jury was given a form, labeled by the district court as a "special verdict," that asked not whether the defendant was liable and in what amount, but rather a series of fact questions. Such questions are the hallmarks of a special verdict and are [**95] governed by Rule 49(a). Under this view, they were questions that "enabled a legal conclusion as to liability, but the jury was not asked for such a conclusion." *Caruso v. Forslund*, 47 F.3d 27, 33 (2d Cir. 1995) (Kearse, J., concurring) (distinguishing between general and special verdicts).

An alternative view of the verdict form is that it was submitted as one general verdict accompanied by written answers to interrogatories, as contemplated by Rule 49(b) (i.e., questions 5, 6, and 7 "awarding" damages to the plaintiff properly can be viewed as embodying a general verdict since they ask the

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[1] To the extent that Lavoie might be read for the proposition that one cause of action on two different theories of liability may support two general verdicts, such language is inconsistent with the law. Thus, as my colleagues rely on this language, they are equally wrong.

question of ultimate liability; questions 1, 2, 3, and 4 are questions of fact upon which the general verdict depends). See *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1151 (6th Cir. 1996) (analyzing similar verdict form as here under Rule 49(b)); *Stanton by Brooks v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 574 (3d Cir. 1983) (same). As we have previously noted, the distinction between a Rule 49(a) verdict and one submitted under 49(b) is vague. See *Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994) ("There is no clear [**96] definition in our caselaw of what constitutes a Rule 49(a) verdict and what constitutes a Rule 49(b) verdict.").

But under which paragraph of Rule 49 the verdict form in this case was submitted need not be decided, because under either view, Ford's objection to the inconsistency was timely and the remedies under both views are fundamentally the same. We have previously stated that under Rule 49(a) and (b), a case-by-case application of principles of waiver is desirable and that parties complaining of inconsistencies in 49(a) verdicts might waive their objection by failing to raise the objection before the jury is discharged.[2] *Denny*, 42 F.3d at 111 (waiver might be found in a case where, e.g., court announces intention to enter judgment on inconsistent verdict before jury is discharged and litigants remain silent). Our cases involving waiver and inconsistent

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[2] Many of our sister circuits have found that under Rule 49(a), a party need not object at all in order to preserve the issue for a subsequent motion to the district court or on appeal. *See Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 851 (10th Cir. 2000); *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Ladnier v. Murray*, 769 F.2d 195, 198 (4th Cir. 1985); *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-45 (3d Cir. 1984) cert. denied 469 U.S. 1072 (1984); *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d 946, 947-48 (5th Cir. 1982).

verdicts, however, have involved situations in which the party seeking a new trial failed to object before the jury was discharged. See id. at 110-111; *Lavoie,* 975 F.2d at 54-57; *Schaafsma v. Morin Vt. Corp.*, 802 F.2d 629, 634-35 (2d Cir. 1986); *Haskell v. Kaman Corp.*, 743 F.2d 113, 123 (2d Cir. 1984). [**97] It emerges from these cases that the crucial time period for the party to object is before the jury is discharged. This is because resubmission to the jury might cure the inconsistency, and courts want to discourage a litigant's tactical misuse of Rule 49 to secure a new trial. See *Skillin v. Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981) (explaining rationale for requirement of pre-discharge objections). Here, however, Ford made an objection to the inconsistency as soon as the jury announced its decision [*68] and before the jury was discharged. In no circumstance have we ever found that an objection made at this point in the proceedings resulted in waiver.

Moreover, we consistently have held that if the jury's inconsistent findings on a special verdict cannot be harmonized, the Seventh Amendment requires that either the trial court or the reviewing court vacate the judgment and order a new trial. See *Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592, 598 (2d Cir. 2001); *Brooks v. Brattleboro Mem'l Hosp.*, 958 F.2d 525, 529 (2d Cir. 1992); *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988).

If, on the other hand, the verdict is viewed as having been submitted under Rule 49(b), then because the two special interrogatory questions (1a and 2a) were inconsistent with each other, and question 1a was inconsistent with the general verdict (questions 5-7), judgment cannot be entered for either Jarvis or Ford. See Fed. R. Civ. P. 49(b) ("When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be

entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."). Although we have found that waiver is possible under Rule 49(b) [**99] if a party fails to object prior to the discharge of the jury (despite the unequivocal language of the rule that "judgment shall not be entered"), see *Haskell,* 743 F.2d at 123, more recently we have confirmed that Rule 49(b) requires the trial court to "resolve the inconsistency even when no objection is made." *Schaafsma*, 802 F.2d at 634-35 (internal quotation marks omitted). Again, because Ford made an objection before the jury was discharged, even if waiver might be properly found under Rule 49(b), it cannot be found in this case.

Thus, viewing the verdict as being submitted under either 49(a) or 49(b), it is this Court's responsibility to harmonize the inconsistency, or if we are unable to do so, to vacate the judgment of the district court and order a new trial. The one view that is not appropriate, and the one the majority takes, is that the inconsistency here is between two general verdicts on different theories. Despite the majority's assertion to the contrary, the inconsistency complained of **is** between two factual findings, namely that the Aerostar's cruise control was both not defective and defective. While it is true that the New [**100] York Court of Appeals has not yet squarely addressed the question as to the overlap between strict products liability and negligent design, it has in dicta, as the majority notes, signaled directly to this Court how it would find if asked. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 258, 639 N.Y.S.2d 250, 255, 662 N.E.2d 730, 735 (1995) (approving of view that defective design is functionally synonymous with earlier negligence concept of unreasonable designing). See also *Gonzalez v. Morflo Indus., Inc.*, 931 F. Supp. 159, 163 n.3 (E.D.N.Y. 1996) (citing Denny for proposition that "negligence and strict liability design defect claims are virtually indistinguishable").

Even in the absence of an explicit statement from the New York Court of Appeals, we can decide that a finding of "no" to strict liability and a finding of "yes" to negligence are inconsistent. Under New York law, "[a] cause of action in strict products liability lies where a manufacturer places on the market a product which has a **defect** that causes injury." *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 478, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717 (N.Y. 1980) [**101] (emphasis added). Similarly, under New York's theory of negligent design, "[a] cause of action in negligence will lie where [*69] it can be shown that a manufacturer was responsible for a **defect** that caused injury, and that the manufacturer could have foreseen the injury." Id. at 480 (emphasis added). New York has stated that a verdict is inconsistent if "a verdict on one claim necessarily negates an element of another cause of action." *Barry v. Manglass*, 55 N.Y.2d 803, 805, 432 N.E.2d 125, 126, 447 N.Y.S.2d 423 (1981).[3] Here, the finding of "no defect" in the strict liability claim precludes the finding of "defective" in the negligence claim. Thus, under New York law, and even in the absence of a clearly applicable statement from the New York Court of Appeals, the answer in one jury question negates an element of the other, and the verdict is inconsistent.

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[3] In Barry, the court found that the apparent jury inconsistency could be resolved because the jury was permitted (while expressing no view as to the propriety of the charge) to find that the product was being misused as a defense to strict liability, but not to negligence. *Barry*, 55 N.Y.2d at 804-05, 432 N.E.2d at 126-27. In the case at bar there is no defense that would apply to one theory but not another, nor is there an allegation of failure to warn. *Cf. Grant v. Westinghouse Elec. Corp.*, 877 F. Supp. 806 (E.D.N.Y. 1995) (verdict of no strict liability consistent with finding of negligence where negligence was based on failure to warn).

This exact conclusion has been reached by at least one New York Appellate court. See *Lundgren v. McColgin*, 96 A.D.2d 706, 464 N.Y.S.2d 317, 317-18 (1983) (reversing and granting a new trial because jury's responses to interrogatories on negligence (yes) and strict liability (no) were inconsistent: "There is no way to reconcile these two answers. The jury could not have concluded that Piper negligently designed the override system and at the same time conclude that it was reasonably safe for its intended use."). Just as the Appellate Division found in Lundgren, there is no way the two answers in this case can be reconciled; the jury could not have simultaneously found a defect and no defect in the design the cruise control system.

Having found no way to reconcile the jury answers to questions submitted to them pursuant to Rule 49, the law demands that we vacate the judgment and remand for a new trial.[4] We have explicitly stated, "the proper approach when faced with seemingly inconsistent verdicts is not to credit one finding and vacate the other." *Harris*, 252 F.3d at 598. The majority in this case does exactly that by crediting the [**103] finding that Ford was negligent, while discarding the finding that it was not strictly liable.

Rejection of this correct legal standard by the majority hinges on the erroneous view that Rule 49 does not govern where the jury has been asked to "apply legal principles." That is not the law of

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[4] A new trial might also provide the parties with a jury that is proficient in performing simple addition free from mathematical error, a task that, from the entries made on the verdict form, apparently was beyond the capabilities of the jury in this case.

this Circuit. See *Landy v. Fed. Aviation Admin.*, 635 F.2d 143, 147 (2d Cir. 1980) ("There is no need to belabor the obvious. The factual findings necessary to support the severe penalty imposed below could not be made without reference to the applicable Aviation Regulations . . . . [Rule 49(a)], which deals with special verdicts and interrogatories, provides that the court shall give the jury such explanation and instruction as is necessary to enable [**104] the jury to make its findings. If, as in this case, an interrogatory is a mixed question of fact and law, the jury must be instructed as to the legal standards they are to apply.").

Nor is it the law of, at least, the First, Fourth, Fifth, Sixth, Eighth, or Federal [*70] Circuits. See *Kissell v. Westinghouse Elec. Corp.*, 367 F.2d 375, 376 (1st Cir. 1966) ("It would be a purposeless restriction to say that special interrogatories cannot be mixed questions of law and fact, provided that the jury is properly instructed as to the law."); *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964) ("Generally, Rule 49(a) permits submission of special interrogatories to juries on issues of fact, but if an issue presents a mixed question of fact and law it may be submitted if the jury is instructed as to the legal standards to be applied; the form of the special issues should be such as not to mislead or confuse the jury."); *Jackson v. King*, 223 F.2d 714, 718 (5th Cir. 1955) (Rule 49(a) "permits submission of special interrogatories to juries only of issues of fact. If the question is a mixed question of fact and law, it may be submitted only [**105] if the jury is instructed as to the legal standards which they are to apply."); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 715 (6th Cir.) (no error where questions submitted under Rule 49(b) required jury to apply law to facts as long as jury was instructed on that law), cert. denied 423 U.S. 987, 46 L. Ed. 2d 303, 96 S. Ct. 395 (1975); *Great Am. Ins. Co. v. Horab*, 309 F.2d 262, 266 (8th Cir. 1962) ("This court has recognized, too, that, under Rule 49(a), a

mixed question of fact and law is nevertheless submissible so long as it is not 'submitted to the jury without an accompanying instruction explaining the legal standards which they are to apply'." (quoting *McDonnell v. Timmerman*, 269 F.2d 54, 58 (8th Cir. 1959)) (citing *Feldmann v. Conn. Mut. Life Ins. Co.*, 142 F.2d 628, 634 (8th Cir. 1944))); *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984) ("Finally, while 'a specific verdict' seeks resolution of only factual issues under a precise reading of Rule 49(a), this court has not found error where a legal question has been included. Rather, since the answer to the legal question [**106] necessarily resolves any disputed underlying factual issues, we have undertaken to review the factual findings on which the legal conclusion is based, applying the substantial evidence standard." (citing *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1550 (Fed. Cir. 1983)), cert denied 471 U.S. 1136 (1985).

The learned author of the majority opinion describes our efforts as an attempt to "shoehorn" the case into Rule 49 in order to avoid the effect of waiver. She continues in this same vein, claiming that to "excuse" Ford from the "well-established" rules of waiver permits "sandbagging" and an undermining of judicial economy.

Instead of sermonizing in the field of legal ethics, the majority should have at least mentioned Fed. R. Civ. P. 46 ("formal exceptions to rulings or orders of the court are unnecessary"), which is clearly pertinent in this case. Rule 51, which deals with jury instructions, must be read together with Rule 46. See *Girden v. Sandals Int'l*, 262 F.3d 195, 202 (2d Cir. 2001) (Rule 51 must be read in conjunction with Rule 46); *Thornley v. Penton Publ'g., Inc.*, 104 F.3d 26, 30 (2d Cir. 1997) (rejecting [**107] Rule 51 forfeiture because, after party "argued its position to the district judge, who rejected it, a further

exception after delivery of the charge would have been a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue"); *In re Air Crash Disaster at J.F.K. Int'l Airport*, 635 F.2d 67, 73 (2d Cir. 1980) ("Federal Rule of Civil Procedure 51 read in conjunction with Rule 46 requires only a minimal objection . . . ."); *Steinhauser v. Hertz* Corp., 421 F.2d 1169, 1173 (2d Cir. 1970); *Curko v. William Spencer & Son, Corp.*, 294 F.2d 410, 414 n.2 (2d Cir. 1961) ("Rule 51 must be read in conjunction with Rule 46 . . . ."); *Keen v. [*71] Overseas Tankship Corp.*, 194 F.2d 515, 519 (2d Cir. 1952) (rejecting Rule 51 waiver because "nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided"); *Wright v. Farm Journal, Inc.*, 158 F.2d 976, 978 (2d Cir. 1947) (stating Rule 51 "must be construed in the light of Rule 46"); *Smith v. Borough of Wilkinsburg,* 147 F.3d 272, 276 (3d Cir. 1998) [**108] (noting relationship between Rule 51 and Rule 46 and stating "our belief that Rule 51 must be read in conjunction with Rule 46); *City of Richmond v. Madison Mgmt. Group, Inc.*, 918 F.2d 438, 453 (4th Cir. 1990) ("Rule 51 must be read in conjunction with Rule 46"); *Landsman Packing Co., Inc. v. Cont'l Can Co., Inc.* 864 F.2d 721, 726 (11th Cir. 1989) (same); *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1370 (9th Cir. 1979) ("Rule 51 is to be read together with Rule 46"); *Stewart v. Ford Motor Co.*, 179 U.S. App. D.C. 396, 553 F.2d 130, 140 (D.C. Cir. 1977) (same).

As in *Stewart v. Ford,* supra, the majority's argument:

> rests on a misconception of the meaning of [Rule 51]. As courts and commentators have recognized, Rule 51 is to be read together with Rule 46 . . . . In order to preserve for appeal an objection to a jury instruction, thus, it is not necessary for a party to except or object

> "if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing."

553 F.2d at 140 (citations and footnotes omitted) (quoting 9 Charles Alan [**109] Write & Arthur R. Miller, Federal Practice and Procedure § 2553 (1971)). Given this lenient standard, I cannot see how the majority finds that Ford failed to sufficiently object before the district court charged the jury. The district court stated that it understood that Ford did not want both theories charged and that this was Ford's "fundamental position." . *Jarvis*, 69 F. Supp. 2d at 589. Thus, the district court did indeed apply the "appropriate legal standard" under Rule 51 especially when read in conjunction with Rule 46. The majority's omission of Rule 46 considerations in their version of what they call "the appropriate standard" is what tips the balance in favor of Jarvis on the waiver issue.

I dissent.

[Appendix: Verdict Form]

SPECIAL VERDICT QUESTIONS

Jarvis v. Ford Motor Company

92 Civ. 2900 (NRB)

If the answer to any question that follows is, by a preponderance of the evidence, "Yes", then you should check the box marked "Yes"; otherwise, you should check the box marked "No". Your answer to each question must be unanimous.

1(a) Do you find by a preponderance of the evidence that the

cruise control system of the 1991 Ford Aerostar [**110] was designed in a defective manner? (Plaintiff's Burden of Proof)

Answer: YES ___ NO ___

IF YOUR ANSWER TO QUESTION 1(a) IS "YES", THEN PROCEED TO QUESTION 1(b). IF YOUR ANSWER TO QUESTION 1(a) IS "NO", THEN PROCEED TO QUESTION 2(a).

1(b) Do you find by a preponderance of the evidence that the design defect in the cruise control system of the 1991 Ford Aerostar was a substantial factor in causing the accident of July 14, 1991 involving Plaintiff Kathleen Madaline Jarvis? (Plaintiff's Burden of Proof)

Answer: YES ___ NO ___

[*72]

2(a) Do you find by a preponderance of the evidence that the defendant Ford Motor Company was negligent in the design of the cruise control system in the 1991 Ford Aerostar? (Plaintiff's Burden of Proof)

Answer: YES ___ NO ___

IF YOUR ANSWER TO QUESTION 2(a) IS "YES", THEN PROCEED TO QUESTION 2(b). IF YOUR ANSWER TO QUESTION 2(a) IS "NO", THEN PROCEED TO THE INSTRUCTIONS FOLLOWING QUESTION 2(b).

2(b) Do you find by a preponderance of the evidence that the negligent design of the cruise control system of the 1991 Ford Aerostar was a substantial factor in causing the accident of July 14, 1991 involving Plaintiff Kathleen Madaline [**111] Jarvis? (Plaintiff's Burden of Proof)

Answer: YES ___ NO ___

IF YOUR ANSWERS TO BOTH QUESTIONS 1(a) AND 1(b) IS "YES", AND/OR YOUR ANSWERS TO BOTH QUESTIONS 2(a) AND 2(b) IS "YES", THEN PROCEED TO THE NEXT QUESTIONS. OTHERWISE, PROCEED NO FURTHER AND REPORT TO THE COURT.

3(a) Do you find by a preponderance of the evidence that plaintiff Kathleen Madaline Jarvis was negligent in the operation of her Ford Aerostar on July 14, 1991? (Defendant's Burden of Proof)

Answer: YES ___ NO ___

IF YOUR ANSWER TO QUESTION 3(a) IS "YES", THEN PROCEED TO QUESTION 3(b). IF YOUR ANSWER TO QUESTION 3(a) IS "NO", THEN PROCEED TO QUESTION 5.

3(b) Do you find by a preponderance of the evidence that the negligence of plaintiff Kathleen Madaline Jarvis was a substantial factor in causing the July 14, 1991 accident? (Defendant's Burden of Proof)

Answer: YES ___ NO ___

IF YOUR ANSWER TO QUESTION 3(b) IS "YES", THEN PROCEED TO QUESTION 4. OTHERWISE, PROCEED TO QUESTION 5.

4. What is the percentage of fault, as found by you in response to Questions 1-3, which you attribute to the defendant Ford Motor Company and to the plaintiff Kathleen Madaline Jarvis?

Defendant [**112] Ford Motor Company *65%*
Plaintiff Kathleen Madaline Jarvis *35%*
(THE TOTAL MUST EQUAL 100%)

5. State separately the amount awarded for the following items of damages, if any, up to the date of your verdict:

(a) Past medical insurance premiums; $ *24,568*

(b) Loss of earnings; $ *340,338*

(c) Pain and suffering up to the date of your verdict $ *200,000*

TOTAL: $ *564,906*

NOTE: If you decide not to make an award as to any of the above items, you will insert the word "none" as to that item.

6. State separately the amount awarded for the following items of damages, if any, from the date of your verdict to be incurred in the future:

[*73] (a) Medical insurance premiums; $ *22,955*

(b) Loss of earnings; $ *648,944*

(c) Pain and suffering, including that from any permanent effect of the injury, from the time of verdict to the age that plaintiff could be expected to live. $ *300,000*

Total $ 672,199

NOTE: If you decide not to make an award as to any of the above items, you will insert the word "none" as to that item.

7. If you have made any award for amounts intended to compensate [**113] the plaintiff for damages to be incurred in the future, then for each item for which an award is made, state the period of years over which such amounts are intended to provide compensation:

(a) Medical insurance premiums; *16* years

(b) Loss of earnings; *16* years

(c) Pain and suffering, including the permanent effect of the injury. *33.1* years

NOTE: If you make no award as to any of the above items, you will insert the word "none" as to that item.

You should now report to the Court.

Signature of Foreperson: */s/*

KATHLEEN MADALINE JARVIS, Plaintiff, - against - FORD MOTOR COMPANY, Defendant.

92 Civ. 2900 (NRB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

69 F. Supp. 2d 582; 1999 U.S. Dist. LEXIS 16838; CCH Prod. Liab. Rep. P15,680

October 27, 1999, Decided

October 27, 1999, Filed

DISPOSITION: [**1] Defendant's motion for judgment as a matter of law granted and the plaintiff's case dismissed. Defendant's motions to reduce the verdict and to dismiss plaintiff's claim for punitive damages granted.

COUNSEL: For Plaintiff: Thomas J. Murray, Murray & Murray Co., Sandusky, OH.

For Plaintiff: George N. Tompkins, Jr., Schnader, Harrison, Segal & Lewis, New York, NY.

For Defendant: Brian P. Crosby, Gibson, McAskill & Crosby, Buffalo, NY.

JUDGES: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY: NAOMI REICE BUCHWALD

OPINION: [*584] OPINION AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Kathleen Madaline Jarvis ("plaintiff" or "Jarvis") filed this diversity action alleging that she was injured on July 14, 1991 when the 1991 Ford Aerostar she was operating suddenly accelerated and traveled into a ditch.[1] Plaintiff alleged that a design defect in the automobile's cruise control system caused the sudden acceleration. After a two-week trial, the jury returned a verdict finding that plaintiff's Aerostar was not defectively designed but that Ford Motor Company ("defendant" or "Ford") nevertheless had been negligent in the design of the vehicle. Additionally, [**2] the jury found Jarvis' own negligence to have been 35% responsible for her accident. The jury awarded damages for past and future medical insurance premiums, loss of earnings, and pain and suffering.

Presently pending is defendant's motion of August 11, 1999 ("Deft. 50(b) Memo"), pursuant to Fed. R. Civ. P. 50(b), for an order granting judgment to defendant as a matter of law, or, in the alternative, granting a new trial.[2] In support of its motion,

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[1] The parties had consented on October 19, 1998 to trial pursuant to 28 U.S.C. § 636(c) before a magistrate judge, a position I held until September 24, 1999. The parties, aware of my impending elevation, understood that I would retain the case. Trial Transcript p. 1643 (hereinafter "Tr.").

[2] Defendant's 50(b) motion is appropriate as Ford's attorney had timely made the prerequisite motion for judgment as a matter of law under Fed. R. Civ. P. 50(a). During the trial, plaintiff's 50(a) motion was granted to the extent that plaintiff's strict liability claim was dismissed inasmuch as it was based on a failure to warn theory. Tr. 1262.

defendant argues, first, that the jury's verdict was inconsistent because its finding that Ford was not strictly liable negates its finding of negligence and, second, that [*585] the negligence finding is against the weight of the evidence. Defendant also moved [**3] on August 11, 1999 ("Deft. 4545 Memo") for an order reducing the verdict by the amount of collateral source payments plaintiff has received and will receive in the future pursuant to CPLR § 4545. Finally, defendant has asked the Court to rule on its motion to dismiss plaintiff's punitive damages claim originally filed on June 6, 1997 ("Deft. Punitives Memo").[3] Plaintiff has offered a response to each of these motions. (Respectively, "Pl. 50(b) Mem."; "Pl. 4545 Mem."; and "Pl. Punitives Reply"). We will discuss each of these motions in turn, with particular attention first to the issue of the jury verdict inconsistency and then to the sufficiency of the plaintiff's evidence.

BACKGROUND

Plaintiff filed this products liability action pleading design defect causes of action under both strict liability and negligence theories. Plaintiff testified during the trial that she started her six-day-old Aerostar on July 14, 1991 in the driveway of her

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[3] The trial was bifurcated to allow plaintiff to initially submit evidence on the issues of liability and compensatory damages with her claim for punitive damages deferred until after the jury's verdict. Pretrial Hearing of May 18, 1999, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), Transcript p. 241 (hereinafter "Daubert Hearing Tr."). At the end of the presentation of evidence, defendant renewed its motion to dismiss the punitive damages claim. Tr. 1607. This court again reserved ruling until after the jury's verdict. Id.

home in Woodstock, New York, with her foot on the brake and the car in "park."[4] Tr. 73. According to the testimony, the vehicle proceeded to suddenly accelerate down the driveway. Tr. 74-75. Plaintiff testified that she attempted to stop the vehicle by stepping on the brake with both feet, but that the vehicle did not stop. Tr. 83-84. The vehicle traveled approximately 330 feet down the driveway, came to a stop in a drainage ditch, and overturned. Tr. 695.

The essence of plaintiff's claim is that the stand-alone cruise control in the 1991 Ford Aerostar[5] was defectively designed because, upon ignition, battery voltage will be supplied to the cruise control system (in particular, the servo component) and thus that the simultaneous occurrence of two transient electrical events could result in the car's throttle going to a wide open condition, causing a sudden, unintended acceleration of the vehicle without driver input. It was further plaintiff's position

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[4] Plaintiff testified as to facts related to both liability and compensatory damages together pursuant to a pretrial ruling in which the Court denied defendant's motion to separate the liability phase from the compensatory damage phase of the trial. This ruling was based in large measure on the representation by plaintiff's counsel that the plaintiff's injuries affected her ability to recall events and that the jury needed to hear damage testimony in order to be able to fully appreciate the liability testimony. After hearing the plaintiff testify in court, however, it is now clear that an additional bifurcation between liability and compensatory damages would have been appropriate. Apart from plaintiff's testimony that she blacked out at the very end of the incident itself, plaintiff did not exhibit any memory problems on the witness stand, and her own expert psychiatric witness, Dr. Douglas Anderson, testified that plaintiff had a "very clear, vivid" recollection of the event. Tr. 149. The time period for which plaintiff's memory was compromised does not affect considerations of liability.

[5] Plaintiff's expert acknowledged that this design was not unique to Ford automobiles. Tr. 919.

that the mechanical features of the car were not adequate to overcome an electrically-caused wide open throttle condition, i.e., that the design lacked a failsafe mechanism. [6]

Ford's position was, first, that the vehicle was properly designed to overcome [*586] even the statistically remote possibility that two simultaneous electrical events could occur, resulting in a wide open throttle. Second, Ford's position was that there was no evidence that the two simultaneous electrical faults postulated by the plaintiff's electrical engineering expert ever occurred in the plaintiff's vehicle, or that the vehicle did not have adequate mechanical back-ups, and indeed that the physical evidence was to the contrary. Moreover, Ford presented another explanation for the events which plaintiff described and which considered the testimony of other witnesses to the events as well as the physical evidence.

DISCUSSION

I. Verdict Inconsistencies

Defendants initially make this application to set aside the verdict as inherently inconsistent based on the jury's answer to two special verdict questions. First, the jury answered "no" to the

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[6] The Court's charge specifically instructed the jury to "decide whether the design of the cruise control system of the 1991 Aerostar considered in its entirety was defective" (Tr. 1590), and that they should consider the design of the cruise control components as well as the brakes and dump valve. Tr. 1496 ("the cruise control system along with the throttle body and the braking system."), 1591 ("[cruise control] system, including the dump valve").

question, "Do you find by a preponderance of the evidence that the cruise control system of the 1991 Ford Aerostar was designed in a defective manner?" Court Ex. 12. Second, the jury answered "yes" to the question, "Do you find by a preponderance [**7] of the evidence that the defendant Ford Motor Company was negligent in the design of the cruise control system in the 1991 Ford Aerostar?" Id. Defendant reasons that the jury's finding that the cruise control was not defective "precludes a finding, legally and logically, that Ford was negligent in designing the cruise control system." Deft. 50(b) Memo at 3. Plaintiff argues that the Court must make every attempt to reconcile the jury's answers on the verdict form to find a consistent way to interpret the verdict, even if such a reading is "strained." Pl. 50(b) Mem. at 7 (citing *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1311 (2d Cir. 1993)). We find that the two jury determinations cannot be reconciled.

For nearly twenty years, lower courts in New York have found that the two theories of negligence and strict liability for design defect are "almost functionally equivalent." *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 766-67 (E.D.N.Y. 1981) (Weinstein, J.) (citing *Lancaster Silo & Block v. Northern Propane Gas*, 75 A.D.2d 55, 427 N.Y.S.2d 1009, 1013 (4th Dep't 1980)). In *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 257-58, 639 N.Y.S.2d 250, 255-56, 662 N.E.2d 730, 735-36 (1995), [**8] New York's Court of Appeals formally endorsed this proposition for all design defect claims, citing several cases and law review articles to establish that negligence and strict liability design defect claims are "functionally synonymous" since the strict liability analysis is "negligence-inspired." See also *Gonzalez v. Morflo Industries, Inc.*, 931 F. Supp. 159, 164 n.3 (E.D.N.Y. 1996) (citing Denny for proposition that "negligence and strict liability design defect claims are virtually indistinguishable"); *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 387, 568 N.Y.S.2d 550, 555-56, 570 N.E.2d 198, 203-04

(1991) (failure to warn claim, "though it may be couched in terms of strict liability, is indistinguishable from a negligence claim").[7]

As a consequence of this functional equivalence, defendant's position that a finding of no defect and a finding of negligence are inconsistent as a matter of law in a product liability case is well supported [8] The Restatement (Third) of [*587] Torts instructs that "two or more factually identical defective-design claims ... should not be submitted to the trier of fact in the same case under different doctrinal labels." Restatement (Third) Torts § 2, cmt. n (warning that the submission of the same claim on "multiple theories of recovery ... would generate confusion and may well result in inconsistent results"). Accordingly, in New York, as in virtually all jurisdictions, in a products liability action premised on a design defect theory, a jury finding that the product is not defective precludes a parallel finding that the

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[7] Plaintiff's reliance on *Chase Manhattan Bank, N.A. v. T & N*, PLC, 905 F. Supp. 107, 122 (S.D.N.Y. 1995), to draw sharp distinctions between strict liability and negligence design defect claims is misplaced as Chase was decided two months before the Court of Appeals articulated their equivalency in Denny.

[8] While we readily admit that our pretrial research failed to learn of the wide acceptance of the equivalency of negligence and strict liability claims in design defect cases, we remain puzzled why this overlap was not brought to our attention given that defendant's attorney was also of counsel to defendant Ford in the Denny case. Although we are lacking in hard evidence, we similarly doubt whether plaintiff's three experienced counsel shared our unfamiliarity with this case law. Thus, we suspect that both sides elected for strategic reasons to refrain from informing us of the overlap and potential for inconsistent verdicts. Regardless, we analyze this case in conformity with the now-revealed governing case law.

manufacturer is negligent in designing the product. *Lundgren v. McColgin*, 96 A.D.2d 706, 464 N.Y.S.2d 317 (4th Dep't 1983). After a jury finding of no strict liability but negligence in a pure design defect case, the Lundgren court held, "the jury could not have concluded that [defendant] negligently designed the override system and at the same [**10] time conclude that it was reasonably safe for its intended use." 96 A.D.2d at 706, 464 N.Y.S.2d at 318.

Similarly, in *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150 (6th Cir. 1996), the Sixth Circuit held that "proof of a defective product is essential to the products [**11] liability or the negligence claim." According to the Sixth Circuit, the distinction between the two claims is of "no practical significance" and a jury finding of negligence without a finding of strict liability is "legally inconsistent." Id. (citations omitted). Another example is the case of *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984). In Witt, the jury found for the defendant on the strict liability question as to whether a shower door was defective but, at the same time, found the defendant negligent. The Eleventh Circuit regarded the two findings as "irreconcilably contradictory." 725 F.2d at 1280. See also *Romero v. International Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992) (jury verdict that defendant had "failed to exercise reasonable care" irreconcilable with jury verdict in favor of defendant on negligent design and strict liability claims).[9]

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[9] State courts have made similar holdings in *Halvorson v. American Hoist & Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303 (Minn. 1976); *Lecy v. Bayliner Marine Corp.*, 94 Wash. App. 949, 973 P.2d 1110 (Wash. Ct. App. 1999); and *Lambert v. General Motors*, 67 Cal. App. 4th 1179 (Cal. Ct. App. 1998). Wisconsin is the only jurisdiction we have found with a contrary view. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380 (Wis. 1999).

In this case, the jury was instructed with respect to the strict liability cause of action that:

> A product is defective if it is not reasonably safe -- that is, if the product as designed is so likely to be harmful to persons or property that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed as designed.

Tr. 1589-90. With respect to the negligence cause of action, the jury was instructed:

> If you find that the 1991 Aerostar which plaintiff claims caused her injury was defective when put on the market by the Ford Motor Company, that with such a defect the vehicle was reasonably certain to be dangerous when put to normal use, that Ford failed to use reasonable care in designing the vehicle or in inspecting and testing it for defects, or that even though Ford used reasonable care in designing, inspecting, and testing the 1991 Aerostar, that Ford learned of the defect before putting the product on the market but did nothing about it, you will find that Ford was negligent.

Tr. 1592-93. As is evident in the charge, in order for the jury to find Ford negligent, it necessarily [**13] had to find that some defect existed in the cruise control. Thus, the jury's finding that there was no defect in the cruise control is inconsistent with its [*588] finding that Ford was negligent in designing the cruise control.

In apparent recognition of the force of Ford's argument, plaintiff has endeavored to recast her position from the pretrial and trial phases of this case. She now attempts to argue that a negligence finding is compatible with the jury's finding of no design defect because although the cruise control "in and of itself is not defective when operated in accordance with its intended design," the negligence lay in "designing the components of the cruise control system ... in such a way that those components can suddenly activate the throttle in a stationary vehicle." Pl. 50(b) Mem. at 12. Assuming that this distinction is more than semantics, plaintiff is attempting to distinguish a defect in the intended design from the plaintiff's use of the Aerostar. This interpretation, though, contradicts plaintiff's earlier position that she got in the car and turned it on according to its intended design. She testified, "I got up into the van, you know, I closed the door, put [**14] the seat belt on ... and I had my right foot on top of the brake, because that's how dad taught me back in 1967." Tr. 73. Plaintiff never introduced any evidence that she operated the vehicle in an unintended but reasonably foreseeable manner. This entire trial centered around whether the cruise control could be activated in a way that was unintended, regardless of driver input.[10]

Moreover, throughout the pretrial and trial phases, plaintiff's counsel was adamant that the jury could only reach one of two possible conclusions. As he asked the jurors, "this all comes down to was this driver error? Or was this a malfunction of the cruise control? In other words did [Jarvis] malfunction, or did

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[10] Again, the jury was charged that for purposes of this case, the cruise control system included the braking system.

the machine?". Tr. 32.[11] If, as plaintiff's counsel had maintained, these were the only options, then the jury's finding that the cruise control was not designed defectively surely negates Ford's negligence. [**15] As a result, the verdicts are irreconcilable.

A. Waiver

Plaintiff alternatively argues that, even if the jury's verdict was inconsistent, Ford waived its challenge because it failed to object to either the charge or the special verdict questions. Citing *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48 (2d Cir. 1992), plaintiff argues that defendant was required to object to the jury instructions prior to the jury retiring. Pl. 50(b) Mem. at 13. Defendant, who made the objection immediately [**16] after the jury's verdict and before the jury was discharged, cites *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884 (2d Cir. 1988), in which the Second Circuit refused to find a waiver where counsel made the objection after the jury was discharged but before the trial court entered judgment.

We need not attempt to reconcile the Lavoie and Auwood decisions because, even assuming plaintiff's interpretation of the law is correct, defense counsel's failure to object cannot constitute a waiver because we clearly ruled in a pretrial conference that we intended to charge both negligence and strict

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[11] See also Daubert Hearing Tr. 137 ("there [are] only two ways that this vehicle can do what Ms. Jarvis says it did: either a malfunction in the components of the cruise control or driver error. [These are] the only two possibilities"); Tr. 1547 ("there is only two ways something like this can happen. Only the driver's foot or the cruise control can move the throttle to a wide open position"); Tr. 1579 ("it comes down to whether Kathy Jarvis knew the machine malfunctioned or she malfunctioned").

liability. Pretrial Conference of July 12, 1999 at 27-28 (hereinafter "Pretrial Conf.").[12] At that [*589] conference, and at times previous to the conference, defense counsel made it clear that they believed the case should have gone to the jury on either a negligence or strict liability theory, but not both. Although it is true that defense counsel did not specifically object to our charge and special verdict questions on the ground that they could lead to inconsistent results, we cannot find a waiver because the defense's fundamental position on this issue had previously [**17] been expressed to the Court and, after our ruling at the pretrial conference, it was reasonable for defendant to conclude that future efforts to object would be unavailing. See *Anderson v. Branen*, 17 F.3d 552, 556-57 (2d Cir. 1994) (citing *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 178 (2d Cir. 1992).

B. Inconsistent Verdicts and Judgment as a Matter of Law

Having decided that the verdict is fatally inconsistent, the next question is whether we should order a new trial or grant judgment as a matter of law to defendant. [**18] [13] Many courts faced with inconsistent design defect jury verdicts have found

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[12] The dual charge issue had been raised in an exchange of correspondence with the Court pretrial and had culminated in our ruling the day before trial: "I don't believe that there's any authority that I'm aware of that would permit a court over the objection of a plaintiff to not charge negligence or not charge strict liability if the plaintiff wants them both charged. So since you want them both charged, I'll charge them." Pretrial Conf. 27-28.

[13] Rule 50(b) provides that "if a jury returns a verdict for which there is not a legally sufficient evidentiary basis, the district court may either order a new trial or direct the entry of judgment as a matter of law." *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998).

their plaintiffs' cases insufficient to sustain a jury verdict under any theory. For example, in the Tipton case described above, the court, finding that "the negligence theories that were not eliminated by the verdict of no defect ... were devoid of evidentiary support," directed the district court to enter judgment in favor of the defendant. 101 F.3d at 1151. Similarly, in *North American Catamaran Racing Assoc., Inc. v. McCollister,* 480 So. 2d 669, 671 (Fla. Dist. Ct. App. 1985), review denied, 492 So. 2d 1333 (Fla. 1986), a case in Florida in which a jury found a catamaran not defective but nonetheless found for the plaintiff, the court reversed the judgment and remanded for entry of judgment for defendant. See also *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir. 1998) (lack of specificity of jury verdict was harmless in light of insufficiency of evidence); *Romero*, 979 F.2d at 1446 (entering judgment for defendant despite split jury verdict for plaintiff on "reasonable care" claim and for [**19] defendant on negligent design and strict liability claims).

Other courts have remanded cases with inconsistent verdicts back to the trial court for a new trial. See *Witt,* 725 F.2d at 1280 ("Because these findings are irreconcilably contradictory, we must remand for a new trial on the issue of liability"); *Lambert v. General Motors*, 67 Cal. App. 4th at 1186 ("The proper disposition, in our view, is to remand for a new trial"); *Lundgren,* 96 A.D.2d at 707, 464 N.Y.S.2d at 318 ("Judgment unanimously reversed on the law and facts ... and a new trial granted").

Because the case law is unclear as to whether the appropriate result is to grant a new trial or grant defendant [**20] judgment as a matter of law based on the inconsistent verdict, we instead analyze the evidence presented to determine whether, assuming that the jury had found for plaintiff on the strict liability theory, we would have granted defendant judgment as a matter of law

based on the sufficiency of the evidence adduced at trial.

II. Sufficiency of the Evidence

Our discussion of the sufficiency of Jarvis' evidence is structured as follows: first, we will discuss the legal standards for judgment as a matter of law; second, we will discuss the controlling case law for design defect claims in New York; third, we will discuss the need for expert evidence in scientifically complex design defect cases such as this one; and fourth, we will discuss whether plaintiff has met her burden of proving that the claimed defect actually existed and caused plaintiff's injury.

[*590] A. The Legal Standard For Judgment as a Matter of Law

"Judgment as a matter of law may not properly be granted under Rule 50 unless the evidence, viewed in the light most favorable to the opposing party, is insufficient to permit a reasonable juror to find in her favor." *Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir. 1999) [**21] (quoting *Galdieri-Ambrosini*, 136 F.3d at 289). In considering a Rule 50 motion, the trial court "must give deference to all credibility determinations and reasonable inferences of the jury, and it may not itself weigh the credibility of witnesses or consider the weight of the evidence." *Galdieri-Ambrosini*, 136 F.3d at 289; *Kirsch v. Fleet Street Ltd.*, 148 F.3d 149, 161 (2d Cir. 1998).

According to another formulation of the Second Circuit test, "judgment as a matter of law should not be granted unless (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict

against it." Id. (internal quotation marks and citations omitted). See also, *Doctor's Associates, Inc. v. Weible*, 92 F.3d 108, 111-12 (2d Cir. 1996) (judgment as a matter of law is inappropriate unless there is "either an utter lack of evidence supporting the verdict, so that the jury's findings could only have [**22] resulted from pure guesswork, or the evidence [is] so overwhelming that reasonable and fair-minded persons could only have reached an opposite result") (internal quotation marks and citations omitted). "A mere scintilla of evidence is insufficient to present a question for the jury." *Fane v. Zimmer*, 927 F.2d 124, 128 (2d Cir. 1991) (quoting, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 743 (2d Cir. 1975)).[14]

B. The Law [**23] of Design Defect

To prevail, plaintiff must prove that the 1991 Ford Aerostar was defectively designed. If plaintiff cannot establish that the vehicle was defectively designed for purposes of strict liability analysis, the case law on inconsistent verdicts (see supra, at section I) precludes a negligence finding based upon the same design defect. Therefore, our discussion focuses on the sufficiency of the strict liability claim. Only if the evidence supporting strict liability is sufficient would a new trial be ordered.

The governing law for design defect product liability in New

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[14] One factor courts use to determine whether judgment as a matter of law is appropriate is whether plaintiffs have had a fair opportunity to prove their claim but they failed to do so. See, e.g., *Weisgram v. Marley Co.*, 169 F.3d 514, 517 n.2 (8th Cir. 1999). Here, plaintiff has not only been granted the opportunity to adduce her full case at trial, but she has also been the recipient of several favorable pretrial evidentiary rulings and had been allowed to amend the pretrial order twice to elicit new evidence. Tr. 1271.

York was summarized by the state's Court of Appeals in *Voss v. Black & Decker Manufacturing Co.*, 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 402, 450 N.E.2d 204, 208 (1983):

In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury.

See also *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997) [**24] (same).

Generally, a plaintiff must provide enough evidence for a jury to conclude that a series of propositions are more likely true than not:

> (1) the product is "defective" because it is not reasonably safe as marketed; (2) the product was used for a normal purpose; (3) the defect was a substantial factor in causing the plaintiff's injuries; [*591] (4) the plaintiff by the exercise of reasonable care would not have both discovered the defect and apprehended its danger; (5) the plaintiff would not have otherwise avoided the injury by the exercise of ordinary care.

Urena v. Biro Manufacturing Co., 114 F.3d 359, 363 (2d Cir. 1997) (citing *Fane*, 927 F.2d at 128; *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 62, 423 N.Y.S.2d 95, 97 (4th Dep't 1979), aff'd, 52 N.Y.2d 768, 436 N.Y.S.2d 614, 417 N.E.2d 1002 (1980)). See also *Jones v. Lederle Laboratories*, 785 F. Supp. 1123, 1127 (E.D.N.Y. 1992) ("Once [the] conclusion [that one of

these propositions could not have reasonably been established based on the evidence] is reached, there is nothing left to the case").

New York's Court of Appeals has explained, [**25] "since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm." *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 720, 403 N.E.2d 440, 443 (1980) (citing *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc,* 39 N.Y.2d 376, 386, 384 N.Y.S.2d 115, 121, 348 N.E.2d 571, 577 (1976); 2 Harper and James, Torts, § 28.4). See also *Urena,* 114 F.3d at 363 (same). Courts have alternatively referred to the relevant balancing as that of "risk/utility analysis." *McCarthy*, 119 F.3d at 155; *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 239, 677 N.Y.S.2d 764, 767-68, 700 N.E.2d 303, 306-07 (1998). Briefly, under the latter moniker, the test requires that a manufacturer be held strictly liable for harm caused by its product only if the risk of harm outweighs its utility. Id.; *Robinson*, 49 N.Y.2d at 479, 426 N.Y.S.2d at 720, 403 N.E.2d at 443 (citing Restatement (Second) of Torts § 402A). [**26]

Factors to be considered in determining whether a product is reasonably safe include: (1) the likelihood that the product will cause injury; (2) the product's utility to the public as a whole and to the individual user; (3) the technological and economic feasibility of a safer design; (4) the plaintiff's awareness of the danger and the ability to have avoided injury with careful use of the product; and (5) the manufacturer's ability to spread the cost of any safety-related design changes. *Gonzalez,* 931 F. Supp. at 164 (citing *Denny*, 87 N.Y.2d at 257, 639 N.Y.S.2d at 255, 662 N.E.2d at 735; *Voss*, 59 N.Y.2d at 109, 463 N.Y.S.2d at 402,

450 N.E.2d at 208; *Fallon v. Clifford B. Hannay & Son, Inc.*, 153 A.D.2d 95, 550 N.Y.S.2d 135 (3d Dep't 1989)).

Of these factors, the one that is clearly the most crucial in this case is the first. New York's Court of Appeals has said that any design defect plaintiff is "under an obligation" to present evidence that the product presents a "substantial likelihood of harm." *Voss,* 59 N.Y.2d at 108, 463 N.Y.S.2d at 402, 450 N.E.2d at 208. If a plaintiff cannot show that a [**27] product poses a substantial likelihood of harm, then she cannot make out her prima facie case. *Gonzalez,* 931 F. Supp. at 165 (citing id.; *Fallon*, 153 A.D.2d at 99, 550 N.Y.S.2d at 137). Thus, plaintiff's first burden is to demonstrate that there truly was a defect in the design.

Second, a design defect plaintiff is also under an affirmative burden to prove that the defect was a substantial factor in causing the plaintiff's injuries. *Urena*, 114 F.3d at 363. Where this burden is not met, the plaintiff's claim equally fails. *Jones,* 785 F. Supp. at 1127. Thus, even if a reasonable jury could find the product to be defectively designed, the plaintiff must establish by sufficient evidence in the record that the asserted defect was the proximate cause of the plaintiff's injuries. *Fane,* 927 F.2d at 130-131; *Doll v. Digital Equipment Corp.,* 1996 U.S. Dist. LEXIS 2754, No. 93 Civ. 0359, 1996 WL 107111, at *1 (W.D.N.Y. Mar. 6, 1996) (citing *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864 (1984); *Voss,* 59 N.Y.2d 102, 463 N.Y.S.2d 398, 450 N.E.2d 204); *Crump v. Times Square* [*592] Stores, 157 A.D.2d 768, 769, 550 N.Y.S.2d 373, 374-75 [**28] (2d Dep't 1990) (entering directed verdict where "plaintiffs failed to present sufficient evidence to indicate that the accident was caused by a design defect"). See also *McCarthy,* 119 F.3d at 155 (design defect cannot be shown simply on the basis of a product's inherent risks). "If there is no causal relationship between a defendant's

product and a plaintiff's injury, the defendant cannot be held liable on any product liability theory advanced by the plaintiff's complaint." *Lawrence v. Sofamor*, S.N.C., 1999 U.S. Dist. LEXIS 12228, *16, No. 95 Civ. 1507, 1999 WL 592689, at *5-6 (N.D.N.Y. Aug. 2, 1999) (causation is "indispensable element for each element" of plaintiff's design defect claims).

C. The Necessity of Expert Evidence

In a technical, scientific case such as this, expert evidence to support plaintiff's claim is essential. See, e.g., *Barnes v. Anderson*, 190 F.3d 47, 1999 WL 641814, at *7-10 (2d Cir. 1999) (to survive judgment as a matter of law, plaintiffs must produce expert evidence to prove proximate causation of medical injury); *In Re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1133 (2d Cir. 1995) [**29] (noting need for expert evidence which can overcome the "unique difficulties" in complex tort cases); In re "Agent Orange" *Product Liability Litigation*, 611 F. Supp. 1223, 1262-63 (E.D.N.Y. 1985) (expert testimony as to probabilities "is particularly important when establishing causation in a product liability action");[15] *Gold v. Dalkon Shield Claimants Trust*, 1998 U.S. Dist. LEXIS 22413, No. B-82-383, 1998 WL 351456, at *3 (D. Conn. June 15, 1998 (without expert testimony "as to causation to link the defect to the injury, a reasonable jury could not find that the plaintiff has proved that the defect caused her specific injuries").

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[15] Judge Weinstein cited to a Fifth Circuit case, *Perkins v. Volkswagen of America*, 596 F.2d 681, 682 (5th Cir. 1979), which affirmed the entry of a directed verdict where the plaintiff's expert was not qualified to testify as to automobile design defects and plaintiff failed to establish causation. Id.

The Second Circuit's decision in *Fane,* 927 F.2d at 130-132, [**30] which upheld a trial court's directed verdict in a design defect case where the plaintiff failed to provide sufficient evidence of causation, is illustrative. Reviewing the trial record for claims of both negligence and strict liability, the court reasoned that the issue of causation was so scientifically complicated that it was "beyond the sphere of the ordinary juryman and required expert testimony." Id. Distinguishing the facts of Voss, the court pointed out that unlike a relatively straightforward case, such as an injury caused by a circular power saw, an expert is required where "no one knows for sure what happened." Id. at 131. In Fane, there were alternate theories as to precisely what started the chain of events that led to the plaintiff's injury. Id. Since the plaintiff's experts could not tie their theory to what actually happened to the plaintiff by any evidence, the Second Circuit found the plaintiff's testimony to be insufficient to establish causation. Id, at 131-32 ("Nonexpert witnesses can only theorize as to how the leg was fractured and the device broken").

D. The Plaintiff's Evidence

It is with these legal [**31] principles, concerning judgment as a matter of law, design defect, and the need for expert testimony, that we will review the evidence presented by the plaintiff. Specifically, we will review the evidence from the dual perspectives of: (a) whether plaintiff has established that the cruise control system of the 1991 Ford Aerostar was defectively designed and (b) whether, assuming that defect has been established as a matter of theory, plaintiff has sufficiently proven that the defect actually caused the plaintiff's injury. While these two issues are analytically distinct, it is difficult to parse the testimony here into the two subject areas without being either confusing or repetitive. Accordingly, our discussion is initially melded, but will be followed by a discussion of the basis for our

conclusions on each issue.

[*593] 1. Plaintiff's Description of the Accident

According to the plaintiff, around 4:45 or 4:50 p.m. on July 14, 1991, she got into her Aerostar in order to move it from the middle of the driveway, where her father had left it. Tr. 69-70. She testified that, at the time, she was "ticked [] off" due to the sight of her father operating a chainsaw nearby, close [**32] to her eight-year-old son. Tr. 71-72. She said that she got into the Aerostar, closed the door, put on her seatbelt, put her right foot "lightly on the brake" and turned the ignition key. Tr. 73. She testified that she never moved the gear out of "park." Tr. 258-59. According to her testimony, "all of a sudden, the car went vroom and took off," kicking up gravel from the driveway behind it. Tr. 73-74.

Jarvis testified that, looking down to verify that her foot was on the brake, "pounding" the brake with "two feet pumping" and "holding onto the steering wheel with all of [her] might," she could not stop the vehicle. Tr. 74, 83-84, 255-59. At the same time, she testified that she maneuvered the vehicle to avoid three pedestrians ahead of her on the curved gravel driveway and a tree to one side of it. Tr. 74-75, 260. Along the way, she said she glanced down to the dash board, where she saw the speedometer "going up" and a brightly colored emergency light that read "brake." Tr. 80-81, 279-80. Jarvis testified that she remembered the car driving off the road and brushing up against saplings before she blacked out. Tr. 75.

Plaintiff called an accident reconstructionist, George David

[**33] Pope ("Pope"), [16] to explain the events in a more technical fashion. According to Pope, the car traveled approximately 330 feet before it came to a rest in a drainage ditch and tipped over. Tr. 695. Assuming a wide open throttle condition, [17] he hypothesized that, "she was able to slow the vehicle to, I believe, 15 to 20 miles an hour as she went into the ditch and overturned." Tr. 702. Initially, Pope had examined the physical evidence for the possibility of brake failure ("Her initial comments were, my brakes weren't working and my brakes failed... that was the point of my initial investigation to evaluate was there a brake failure or not?") Tr. 700. Pope concluded, though, that there was nothing wrong with the braking system of the Jarvis vehicle. Tr. at 710.

2. Plaintiff's Sudden Acceleration Theory

Plaintiff called Samuel J. Sero ("Sero") [18] in its effort to explain

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[16] Pope has a bachelor's degree in mechanized engineering from the Rose Hulman Institute of Technology in Terre Haute, Indiana and an M.B.A. from Indiana University. Tr. 663-64. Earlier in his career, Pope designed automotive power brakes for the Bendix Corporation, where he rose to the position of engineering manager. Tr. 664. He is now a forensic engineer, and braking systems are involved in 25 to 30 percent of his work. Tr. 665-66. [**34]

[17] It was agreed by parties that the wide open throttle condition under these circumstances is approximately 75 percent open.

[18] Sero, a licensed electrical engineer, has a bachelor's degree in electrical engineering from the Carnegie Institute of Technology (now Carnegie Mellon University). Tr. 837. He worked for the Allegheny Power System for twelve years as a planning engineer, standards engineer, and finally as a transmission lines engineer, investigating and maintaining the flow of

to the [*594] jury the theoretical basis for how a vehicle could suddenly accelerate without driver input. While Sero posed two theories, both involving simultaneous electrical faults, as to how an unintended wide open throttle condition could occur, Sero testified that his second scenario, involving the simultaneous grounding of the automobile's vent and vacuum wires, did not happen here. Tr. 955. Thus, we will focus only on the first theory. [19]

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electricity through transmission lines and in people's homes. Tr. 837-39. Since 1979, Sero has worked as a private consultant, specializing in forensic engineering for attorneys and private businesses. Tr. 842. Sero has no professional experience whatsoever in the automobile industry and has no training in human factors, the study of how people do things and what will cause people to react. Tr. 917. Sero has not published the theory testified to here in any form, nor, by his own admission, is there any literature in the automotive engineering field that supports his theory. Tr. 918. Sero was not proffered as an accident reconstructionist, i.e., to explain what actually happened to the plaintiff's vehicle on July 14, 1991. Tr. 990; Daubert Hearing Tr. 137. Indeed, Sero would have been totally unqualified to offer such testimony as he never inspected the vehicle (Tr. 927), never tested the performance of the vehicle (Tr 928), and never tested the mechanical features of the minivan. Tr. 948. [**35]

[19] On May 18, 1999, we held a pretrial hearing to determine the admissibility of Sero's testimony under *Daubert*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999). At the hearing, Sero postulated yet a third scenario. We found, however, that the third hypothesis did not meet the Daubert standards of admissibility. *Jarvis v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 10041, No. 92 Civ. 2900, 1999 WL 461813, at *3-5 (S.D.N.Y. July 6, 1999). The admission of Sero's first two theories into evidence was based on plaintiff's representation that they would be connected by direct and circumstantial evidence to the incident at issue. 1999 WL 461813, at *5; Daubert Hearing Tr. 222-23. As the discussion infra will demonstrate, that promise was illusory. Additionally, at the Daubert hearing, plaintiff had argued that a blue ribbon panel assembled

Under Sero's first (hereafter described without that adjective) theory, there must be both: (a) an open ground wire from the speed amplifier [20] and (b) a grounding of either the vent or the vacuum ("vac") wires. [21] Tr. 944. An open ground wire can result from looseness (usually due to corrosion or breakage), either at the point where the ground wire attaches o the amplifier or where the ground wire attaches to the metal of the car. A grounding of the vent or the vac wire can, according to Sero, occur if there is: (a) moisture or contaminate on the

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by the National Highway Traffic and Safety Administration ("NHTSA") to study sudden acceleration had been misled by Ford into believing that a cruise control malfunction could not cause sudden acceleration in a stationary vehicle. Jarvis, 1999 WL 461813, at *9; Daubert Hearing Tr. 206-09, 215. Given the full review of plaintiff's evidence at trial though, this argument likewise has proven to be far less convincing than the representations at the evidentiary hearing. [A full discussion of the NHTSA study appears infra, at section II(D)(4)(c).] Were this case to be retried, the NHTSA finding ("the occurrence of such simultaneous, undetectable failures is virtually impossible" Ex. F-4 at viii), combined with other weaknesses in Sero's findings, would make the admissibility of Sero's testimony problematic under Fed. R. Evid. 702. We remain mindful, though, of the Second Circuit's holding in *In Re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, which rejected a trial court's extension of Daubert to discount scientific evidence already before the jury. In keeping with the Second Circuit's admonishment, this decision is based on the sufficiency of plaintiff's evidence and not its weight.

[20] The speed amplifier connects to the servo and controls the vent and vacuum wires, which in turn control the level of throttle needed to keep the car traveling at a particular speed.

[21] The grounding of the vent or the vac wire involves an exposure of the wire plus its contact with metal. Thus, it may be said that three simultaneous events must occur. Tr. 945.

circuit board or at the connector to the speed amplifier (Tr. 873-74); (b) overheating of the circuit board causing it to "expand" or "bow up" (Tr. 875); or (c) a nick in the wire insulation that allows either wire to make contact with metal.

For the postulated wide open throttle condition to result in an accident (or, put another way, to constitute a defect), there must be no built-in mechanism to close the throttle, even assuming that the simultaneous, random electrical events could occur in "real life." According to Sero, "there is no mechanism existent in this device to kill the power, take it to a failsafe condition, not one." Tr. 877. Sero rejects the dump valve - which vents the servo, releases vacuum pressure, and causes the throttle to close - as a failsafe mechanism because: (a) he asserts that unless you keep the brakes depressed, the electrical fault will not clear; (b) the dump valve itself may be misadjusted; and (c) the dump valve will not perform its function unless the driver knows to brake. In addition, Sero maintains that the braking system of the car will not function well if [*595] there is a wide open throttle condition because the vacuum assist to the brakes will be lost.

In sum, for Sero's theory to actually cause the accident that occurred here, four things or events must occur, two of them simultaneously and the others within seconds thereafter: (1) there must be an open ground wire from the speed amplifier; [**38] (2) there must be a grounding of the vent or the vac wire which involves both the exposure of the wire and its contact with metal; (3) there must be a failure of the dump valve; and (4) there must be a loss of braking power.

3. An Evaluation of Plaintiff's Evidence

We will examine first the evidence relating to the simultaneous, random electrical events that Sero posits. At the outset, we note that it is basic (and convenient) to Sero's theory that there will

be no physical evidence that the electrical events occurred. Sero testified, "There will be no arc, no physical evidence left. There will be nothing left to prove it ever happened. It will be a random event" (Tr. 860) that "heals itself." Tr. 975. [22] Sero does not dispute, though, that shorts to ground can occur from breaks in the insulation, disconnections, etc., and that there would physical evidence of such an event.

Focusing first on the ground wire from the speed amplifier, Sero agreed that there was no evidence that the ground wire was not making full and firm electrical contact during the relevant time period, or that there was any physical damage to the ground wire or the insulation surrounding it. Tr. 926. Victor DeClercq ("DeClercq"), [23] a retired Ford engineer called by both sides to explain the components of the cruise control system, also testified that there was no physical evidence that the ground wires had shorted or become loose. Tr. 1366-67. [24] Under

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[22] Q [to Sero]: And you can't give us any external evidence to support that theory, can you? A: There would be none. That's why it's a random event. Tr. 975.

[23] DeClercq had been involved in the design and development of cruise control systems for Ford that were essentially the same as the one used in the plaintiff's 1991 Aerostar. An extended description of DeClercq's background appears at Tr. 1332-1347. In addition to his cruise control and electrical work at Ford, DeClercq designed circuitry for space satellites and the F-14 fighter aircraft.

[24] In addition, DeClercq testified that Sero's postulation that the ground wire was loose or disconnected was impossible since the ground wire for the amplifier and the speedometer are identical and therefore the speedometer would have read zero contrary to plaintiff's testimony that it was "going up" (Tr. 81) and read 30 to 35 m.p.h. (Tr. 278) or 40 to 45 m.p.h. (Tr. 279). Tr.

Sero's theory, the loose connection could be found where the ground wire attaches to the amplifier or where the ground wire attaches to the car's metal body. However, in contrast to DeClercq, who tested the wires electrically and found them sound, Sero did not perform electrical tests on the wire (Tr. 916) or x-ray the amplifier to see if the insulation was intact. [25] Tr. 926. Further, Sero postulated that the connection between the ground wire and the car could be flawed because of corrosion. However, Sero never inspected the vehicle and could only surmise that the Aerostar, owned by plaintiff for one week and with just over four [**40] hundred miles on it could have been corroded because Ford forgot to galvanize the car. Tr. 937. In short, there was no tangible or even inferential evidence to support the notion that the ground wire was loose or disconnected. [26]

1367-68. Sero admitted he did not know whether or not the same ground wire served both the amplifier and the speedometer. Tr. 930 ("Quite honestly, I don't know in that device if the speedometer is running off the variable speed sensor and then input into a cluster module, or if it's actually a mechanical one"). [**41]

[25]The actual amplifier from the Jarvis vehicle was retrieved by Ford and was physically in the courtroom. Tr. 1349.

[26] Plaintiff might point to the testimony of her father concerning the difficulties he had in getting the cruise control to work earlier that afternoon as evidence of an electrical malfunction. Tr. 304-07. Mr. Jarvis testified that, on the day of the incident, he had driven the car for the first time since he had given it a 20 foot test-drive at the car dealership. Tr. 323-26. Apart from the issue of whether Mr. Jarvis' difficulties arose from his limited familiarity and experience with the newly acquired car, the Sero theory is based on transient electrical events which do not, by their nature, last for hours or remain after the car has been turned off and restarted twice. Thus, Mr. Jarvis' experience does nor provide evidence of Sero's

[*596] The second, and simultaneous, [**42] electrical event that must occur is that there must be a grounding of either the vent or the vac wires. The vent and vac wires run between the servo and the cruise control module. They control the opening and closing of the throttle, which affects the speed of the car. For a grounding of either of these wires to occur, there must be: (a) moisture or debris on the printed circuit of the cruise control module, causing a fault; (b) moisture or debris in the connectors of the wires to the speed amplifier, causing a fault; or (c) a break in the insulation of the wire and the exposure of the wire to metal.

Again, there was no evidence in the trial record from which a reasonable jury could conclude that any of these situations occurred and led to a grounding of the vent or the vac wires. As for the moisture possibility, Sero did not explore what the weather actually was for the week that plaintiff owned the car, but did acknowledge that plaintiff had stated that the day of the accident was dry and sunny. Tr. 939. Nor did Sero test the speed amplifier to ascertain whether a direct infusion of water on the speed amplifier would create the condition postulated. [27] In contrast, Ford sprayed [**43] the inside of the engine to test Sero's hypothesis, with negative results. Tr. 1169-71, 1437.

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theory. Moreover, had Mr. Jarvis' difficulties stemmed from a permanent electrical fault, there would have been physical evidence of such a fault. However, as noted, there is no such physical evidence in the record.

[27] The amplifier is located in the interior of the car, essentially on the passenger, and not the engine, side of the vehicle. Tr. 1413.

Moreover, the notion of debris in the circuit board is unsupported by any evidence at trial and is especially speculative in a car as new as the Jarvis vehicle. As for the possibility of a break in the insulation of the wires, Sero also testified that there was no evidence of physical problems with the vent or the vac wires (Tr. 943), and he acknowledged that if there was no problem with the insulation of the wires, they cannot go to ground. [28] Tr. 915. Similarly, DeClercq testified that he examined the vent and vac wires and that there was no evidence that they were abraded or had gone to ground. Tr. 1367. DeClercq also tested the wires by applying one thousand volts to each and established that the insulation was good. Tr. 1388.

At trial, Sero proposed yet a fourth scenario for how either the vent or the vac wires could have gone to ground: the circuit board could have warped from the heat. While Sero posed this scenario, he agreed that the circuit board showed no evidence whatsoever of warping, suggesting instead that after warping, the circuit board would "contract" or "go back" into precisely the same shape. Tr. 876. Moreover, Sero had no knowledge of what the temperature was on the date of the accident, no idea if the car's windows were opened or closed, or whether the air conditioner had been on. In fact, he conceded that he had no evidence "to support the fact that it was warm enough inside the car to cause a warp in the [circuit] board." Tr. 959. Plaintiff's counsel's promise to connect up this meltdown theory to the

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[28] Each of the wires is double insulated, all are snapped into place, and the entire circuit board has a conformal coating to protect the circuitry. Tr. 1360, 1421.

facts of the case (Tr. 876) remained unfulfilled. [29]

Plaintiff never proffered [**45] evidence that any such moisture, contaminate, nicks, or "bowing" was present in plaintiff's Aerostar on the day of her accident. Tr. at 911-27. There was no direct or circumstantial [*597] evidence upon which a jury could reasonably conclude that either the vent or the vac wires in the Jarvis vehicle went to ground on July 14, 1991.

As noted earlier, it is an essential part of Sero's theory that the vehicle did not include mechanical devices that could have overcome the electrical events that allegedly caused the throttle to open significantly and result in an acceleration that was not intended. Ford maintains that the existence of the Aerostar's dump valve, a spring loaded plunger which is opened when the brake pedal is depressed approximately one half of an inch, is a sufficient mechanical redundancy. [30] If the dump valve is open (i.e., the brake pedal is depressed one half of an inch), it will mechanically release the vacuum and close the throttle, terminating any wide open throttle condition and returning the throttle to neutral.

This undisputed mechanical sequence is of importance in several contexts. First, it undermines plaintiff's own version of the accident, which was that she started the car with her foot on the

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[29] Compare DeClercq's testimony that it is standard for Ford to test its vehicles at temperatures of 120 degrees Fahrenheit. Tr. 1437.

[30] It should be noted that the dump valve is opened before the brakes are actually engaged. Tr. 734.

brakes, and that with her foot on the brake, the car accelerated. [31] Indeed, plaintiff's expert witness, Pope, testified that with a functioning dump valve and plaintiff's foot on the brake, as she testified it was when she started the car, the vehicle could not have gone to wide open throttle or even moved from a standing start.[32] Tr. 754-55. The only evidence in the record was that the

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[31] Where the plaintiff's testimony as to his or her actual injury differs from the chain of events that would lead to an injury caused by the alleged defect, courts have been particularly willing to hold that no reasonable jury could find liability. See, e.g., *Dupper v. General Motors Corp.*, 887 F.2d 1089, 1989 WL 123650, at **5 (9th Cir. 1989) (unpublished opinion) (upholding directed verdict in design defect case where "the appellant's own testimony does not support her [expert's] theory"); *Sanchez v. Stanley-Bostitch, Inc.*, 1999 U.S. Dist. LEXIS 12975, No. 98 Civ. 0494, 1999 WL 639703 (S.D.N.Y. Aug. 23, 1999) (entering summary judgment where expert had testified that allegedly defective gun would fire when bumped, but where there was no evidence that the gun actually was bumped, causing it to fire inadvertently). Cf. *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 479 (1st Cir. 1997)(in reviewing exclusion of expert testimony, "the district court appropriately found it very odd that [plaintiff] would present an expert witness who would testify that her own unwavering testimony was incorrect"). Here, a significant piece of plaintiff's testimony about the sequence of events was rejected by both Pope and Sero. Plaintiff testified that she believed the vehicle was in "park" when it suddenly accelerated, something Sero and Pope admitted is impossible if the transmission was functioning properly. Tr. at 715-16, 952-53. It bears noting that on the eve of trial, in plaintiff's proposed voir dire questions, plaintiff, apparently realizing the impossibility of her testimony, requested that the court inform jurors that when Jarvis "shifted the gear from park to drive, the Ford Aerostar suddenly took off without any throttle or pedal application by Ms. Jarvis." [**47]

[32] Sero agreed with Pope on this point:

Q [to Sero]: If somebody has their foot on the brake when they turn the ignition on, and the dump valve is open, what happens to the throttle?

dump valve was in working order. [33] Tr. 1396-97.

Thus, again, assuming the two simultaneous electrical events, for the vehicle to have gone to a wide open throttle, plaintiff would have needed to release the brake, in turn releasing the dump valve, for the car to move. According to Sero, with the release [*598] of the dump valve, the effects of the electrical [**48] fault will be reinstated, and with a closed dump valve, the vacuum will stay in the system permitting an open throttle. Even assuming that "reinstated" electrical faults and the closed dump valve combine to create a wide open throttle condition, plaintiff still needs to explain why re-application of the brakes would not open the dump valve, return the throttle to idle, and with additional braking, bring the car to a stop.

Sero's explanation is that there will be no vacuum remaining in

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A: Nothing.

Q: It remains in an idle position, doesn't it?

A: That's correct.

Q: So if somebody has their foot on the brake in this 1991 Aerostar, when they are starting it, the vehicle can't take off, can it?

A: Not until they release the brake. Tr. 946.

[33] Sero, who never tested the dump valve (Tr. 948), conceded this point. He testified that the car would not accelerate from a standing start if the brake pedal were depressed and if the dump valve were properly installed and calibrated. Sero further admitted that he had no evidence that the dump valve was not properly functioning. Tr. 945-46, 949.

the vacuum booster to assist the driver and thus the driver will not be able to use the other mechanical device, namely the brakes, to bring the vehicle to a halt.[34] Sero further postulated that the vacuum assist failed because the plaintiff, unaccustomed to anti-look brakes, pumped the brakes instead of applying steady pressure in accordance with the driver's manual. Tr. 882. Sero offered his braking theory despite the fact that he had no experience designing brakes, never tested the brake system in the Jarvis Aerostar, did not know how many pumps of the brake can be made before the vacuum reservoir is exhausted (Tr. 963-64), and never tested the dump valve. Tr. 972.

In fact, plaintiff's other expert witness, Pope, who did have extensive experience in designing brakes, [35] gave testimony totally contrary to Sero's theory:

> Q [to Pope]: Well, if the dump valve was fully operable, and if the dump valve is engaged at approximately half an inch of pedal travel and before the brakes are engaged, and you are at normal pumping phase, the dump valve is always going to be open, so you are never going to be out of vacuum assist, isn't that so?
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> A: As you phrase it, that's correct.
>
> Q: Did you consider that when you were doing your

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[34] The vacuum booster has the capability of adding approximately one thousand pounds of force to what a driver is applying to the pedal, Tr. 697.

[35] Again, Pope testified that these events were not caused by a failure of either the front or the rear brakes. Tr. 710. [**50]

analysis?

A: I considered that the dump valve was operating properly, the braking action would have brought it to a stop well before the ditch.

Q: Alternatively, if she believed she was applying the brake, and in fact was applying the accelerator, by putting the accelerator all the way to the floor in a pumping fashion with the parking brake engaged, the vehicle would continue on down its path, wouldn't it?

A: Yes.

Tr. 745-46. Thus, Pope rejects Sero's theory that you would lose vacuum assist under one version of events testified to by the plaintiff. [36]

Pope's testimony also totally undermined Sero's hypothesis that this accident occurred because plaintiff pumped the brakes rather than applying steady pressure:

Q [to Pope]: if plaintiff indicated then [sic] as the vehicle moved unexpectedly, she was pumping the brake under ordinary pumping, the dump valve would have remained

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[36] Pope admitted that the plaintiff's testimony that she pushed hard on the brake pedal is inconsistent with the absence of skid marks found on the driveway. Tr. 91-92, 749-50. Further, Pope testified that, if plaintiff had, as she testified, pushed as hard as she could on the brake, the vehicle would have been brought to a stop within 30-35 feet, even if the cruise control malfunctioned. Tr. at 729, 739.

open, and the vehicle would have stopped. Do you agree with that?

A: Yes.

Q: So she would have to have been mistaken on that application of brakes, right?

A: Or the dump valve malfunctioning.

[*599] Q: Absent a malfunctioning dump valve?

A: True.

Tr. 755. Again, it will be recalled that the only testimony in the record was that the dump valve was functioning [**51] properly. In fact, plaintiff never made a claim that the dump valve was not functioning properly - a claim far different from one for a design defect. Thus, based on the evidence offered by plaintiff's own expert witness, there is no support for Sero's assumption that the mechanical redundancies of the dump valve and brakes were insufficient to overcome a wide open throttle condition.

4. Judgment as a Matter of Law

A review of the evidence demonstrates that it is completely insufficient to support liability under either a strict liability or a negligence theory and that reasonable and fair minded persons could only have reached a verdict for Ford. Plaintiff did not establish that the postulated simultaneous electrical faults were substantially likely to occur or, even assuming they did, that the mechanical features of the car would not have overcome the resulting wide open throttle condition. Further, even if a jury

could have reasonably found for the plaintiff on the existence of a design defect, plaintiff has still failed to establish that the alleged defect in fact caused Jarvis' accident. Finally, defendant has presented an explanation of the events of July 14, 1991 that [**52] is so overwhelmingly in accord with the evidence adduced at trial that no reasonable jury could have found otherwise.

a. Substantial Likelihood of Harm

Focusing first on the prima facie element of substantial likelihood of harm, it is important to note that plaintiff has offered no evidence to suggest how frequently the alleged design defect is likely to occur. Sero could not even state the mathematical possibility of the two electrical faults occurring at the same time. See *Jarvis*, 1999 WL 461813, at *6 n.16. [37] Plaintiff has absolutely no evidence of her own or support from external scientific literature [38] to allow a rational jury to even begin to engage in a balancing of this risk with the cruise control design's utility. *Liriano v. Hobart Corp.*, 132 F.3d 124, 131 n.12 (2d Cir. 1998); *McCarthy*, 119 F.3d at 155. See also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d

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[37] Defendant's statistical expert, Dr. Michele Vogler, compared the numbers of reported incidents of sudden acceleration incidents studied by Ford covering model years 1985 to 1992 to the number of vehicle trips for the Aerostars on the road during the same time period and concluded that, even assuming all were caused by a design defect, the potential for such an incident is approximately 1 in every 9.5 million ignition starts. Tr. at 1305.

[38] Indeed, the external literature is to the contrary. See discussion of NHTSA study in section II(D)(4)(c), .

Cir. 1947) (Judge Learned Hand's famous expression of the need for mathematical balancing in negligence cases). In *Gonzalez v. Morflo Industries,* 931 F. Supp. at 165-66, the court noted that even though the [**53] plaintiff's experts offered a theory as to how the accident happened, they provided no evidence to suggest how often such an accident occurs and thus "failed to demonstrate even a meaningful, let alone 'substantial' likelihood" that the product would cause the type of harm experienced. See also *Aghabi v. Sebro*, 256 A.D.2d 287, 288, 681 N.Y.S.2d 333, 334 (2d Dep't 1998) (expert's "bare conclusory assertions ... which consisted primarily of speculative allegations with no independent factual basis, were insufficient to raise a triable issue of fact and defeat [defendant's] motion for summary judgment").

Even if a jury could find that the 1991 Aerostar's cruise control bore a substantial likelihood of unintended activation, plaintiff still has not provided proof that the fault could not be overcome by the minivan's mechanical redundancies, namely its dump valve and brake system. First, Pope, plaintiff's knowledgeable brake witness, testified that if plaintiff started the car with her foot on the brake, the Aerostar [*600] could not have gone to a wide open throttle or even moved because the dump valve would have prevented such a scenario. Second, Pope testified that if plaintiff was pumping the brakes as she testified, there would have been no loss of vacuum assist and the brakes would have stopped the car well before she reached the ditch. Thus, both the dump valve and the brakes as designed would have prevented this accident even assuming the unproven simultaneous undetectable electrical faults. Sero's inexpert hypothesizing to the contrary is simply not evidence. [39]

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[39] While Sero offered theories as to why the dump valve and the brakes would not have prevented or overcome a wide open throttle condition, he

On this record, judgment must be entered for the defendant. It is not tenable that a jury could rationally find a substantial likelihood of harm from the Aerostar's cruise control design since plaintiff has not offered any evidence that the attenuated chain of events necessary to result in an accident is likely to occur, let alone with significant regularity. We note that, in her 50(b) motion papers, plaintiff never challenged the jury's finding that the product was not defective as being unsupported by the evidence. In fact, the plaintiff admitted, "there is nothing illogical in the jury finding that the system was not designed in a defective manner." Pl. 50(b) Mem. at 11. This also fatally undermines plaintiff's claim. See, e.g., *Tipton*, 101 F.3d at 1151.

Other courts have entered judgment under similar circumstances. The Fifth, Sixth, and Ninth Circuits have all either upheld or entered directed verdicts for defendants in cases of sudden acceleration injuries allegedly caused by faulty cruise control systems. In *Dupper v. General Motors Corp.*, 1989 WL 123650, at **3, the Ninth Circuit reviewed petitioner's claim that an additional "on/off" switch [**56] for the cruise control would have made the mechanism safer and concluded that "as a matter of law, the absence of such a switch does not make the

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did so without brake design experience, without testing the Jarvis brakes or the dump valve, and without knowledge of the relationship between pumping and the vacuum reservoir. See *Lawrence v. Sofamor*, S.N.C., 1999 WL 592689, at *6 (plaintiff's expert "unqualified to testify on the issue" not sufficient evidence of design defect); see also *Sita v. Danek Medical, Inc.*, 43 F. Supp. 2d 245, 253 (E.D.N.Y. 1999) (summary judgment appropriate in design defect case where plaintiff failed to explain discrepancies between expert's reports). Sero was neither proffered nor qualified as a braking expert at the pretrial Daubert hearing.

system unreasonably dangerous."

In another unpublished opinion, the Sixth Circuit focused on a different aspect of the design defect claim, pointing out that the sequence of events that allegedly made the cruise control system defective was so unlikely as to allow for the district court's finding as a matter of law that the design was not defective. *Cole v. General Motors Corp.*, 852 F.2d 568, 1988 WL 76522, at **3-5 (6th Cir. 1988) (unpublished opinion). See also *Lawrence v. General Motors Corp.*, 73 F.3d 587, 590 (5th Cir. 1996) (reversing jury verdict where plaintiff did not elaborate as to likelihood that alternate design could have avoided accident); *Ashley v. General Motors Corp.*, 666 So. 2d 1320 (La. Ct. App. 1996) (reversing trial court's design defect verdict for plaintiff where plaintiffs failed to offer proof that the accelerator system deviated in any fashion from the identical system installed on similar cars and examination of car revealed no evidence of defect). But cf. *Cole v. Ford Motor Co.*, 136 Ore. App. 45, 900 P.2d 1059, 1063 (Or. 1995) [**57] (upholding a jury verdict for plaintiff in a sudden acceleration case after finding sufficient evidence in that record to sustain the outcome).

b. Causation

We now turn to the analysis of the evidence from a causation of "substantial factor" perspective. For this discussion, we will assume that which we have found was not proven, namely that two, undetectable simultaneous electrical faults could have [*601] occurred in the Jarvis vehicle and overcome its dump valve and braking system on July 14, 1991. Even making this dubious assumption, plaintiff's evidence does not establish that it is more likely than not that the design of the Aerostar's cruise control system was a substantial factor in plaintiff's accident.

While Sero's testimony is replete with hypotheses and proffers

of explanations of how plaintiff's accident could have happened, the record is empty of evidence that would support the proposition that the theoretical defect in fact caused the accident described by the plaintiff. It is undisputed that there is no physical evidence that any of the wires became loose or shorted to ground. Nor did Sero or any other witness called by plaintiff utilize available tests to ascertain [**58] the soundness of the wire's connections or insulation in the Jarvis Aerostar. Thus, Ford's testing evidence demonstrating that all wires and the circuit board were sound and showed no evidence of insulation breakage or grounding was uncontradicted. Likewise, Sero's hypotheses of moisture, contaminate and "bowing" [40] were not only not proven, but were rendered merely speculative at best by the absence of evidence as to the actual weather conditions on the day of the incident, the newness of the vehicle, and Ford's tests on the Aerostar. [41]

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[40] As noted earlier, plaintiff never introduced, despite a promise from plaintiff's counsel to connect this hypothesis to the facts of this case, any evidence to support Sero's suggestion at trial that the speed amplifier circuit board could have warped from the heat and then resumed its pre-meltdown state without a trace of warping.

[41] Nor is it sufficient for plaintiff to simply define away the need to present proof of its theory by suggesting that there will be no trace of the electrical events posited. First, this suggestion is undermined by Sero's admission that there are many scenarios under which there will be physical proof. Second, it must be recalled that NHTSA specifically rejected as "virtually impossible" the "occurrence of simultaneous, undetectable failures." Third, in the absence of evidence, plaintiff cannot meet its burden to establish that its version of events is more probable than not. It is, in part, because of the necessity of an expert's explanation for the events at issue that we find it unreasonable to rely on the testimony of five other individuals who reported experiencing sudden accelerations in Ford Aerostars (Tr. 216, 401-04, 437, 461-62, 473), as well as an even greater number of complaints (totaling 560) investigated by Ford and catalogued in Attachment Q to the report of

In these circumstances, a verdict for the defendant is required. *Matthews v. Hyster Co.*, 854 F.2d 1166, 1169 (9th Cir. 1988) (upholding a directed verdict where the plaintiff's expert "theorized that contaminants may have gotten into the brake system and caused the brakes to malfunction" but did not offer any proof to support this theory). See also *Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982) ("where proximate causation is at issue [in a directed verdict case], the nonmoving party will not have met its burden if the evidence merely suggests the possibility that proximate cause exists"); *Mazzola v. Chrysler France, S.A.*, 470 F. Supp. 24, 26 (E.D.N.Y. 1978) (jury notwithstanding the verdict in automobile design defect case where expert had testified as to theory of how accident could have happened but "had never examined the [plaintiff's] car" to verify theory).

The plaintiff's theory as to the dump valve and braking system is similarly troubled. For a jury to find that the Aerostar was defectively designed, plaintiff would need proof that the dump valve and braking system actually were unable to overcome [**60] [*602] the hypothesized electrical events. However, plaintiff's proof was to the contrary. Pope's testimony was that

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its investigation into alleged unintended acceleration incidents (Plaintiff's Ex. 271, hereinafter "the Updegrove Report"), as an adequate substitute for the presentation of a viable expert explanation of this incident. Whatever may or may not have happened to other individuals is not evidence of what actually happened to the Jarvis Aerostar on July 14, 1991. In reaching this conclusion, we do not mean to suggest that similar act evidence may not be significant in other design defect cases or that the testimony of other incidents could not have been probative of plaintiff's credibility had plaintiff surpassed her initial hurdle of establishing that the "defect" was more than theoretical.

a working dump valve and brake system would have stopped the car and prevented the incident. And the only evidence in the record is that both the brakes and the dump valve were in good working order. In fact, Pope testified that if plaintiff had been pressing hard on the brakes, as she claimed, the car would have stopped in 30 to 35 feet, approximately one-tenth of the 330 foot distance she actually traveled. Sero's theory that the brakes were inadequate because Jarvis pumped them instead of applying steady pressure is belied by his own lack of expertise in braking systems and human factors,[42] the fact that he never tested the brakes or dump valve, and the directly contradictory testimony of Pope.

In cases similar to the one at bar, judgment has been entered for the defendant. For example, in Doll v. Digital Equipment, the court entered judgment for the defendant based [**61] on the failure of the plaintiff's experts to "link the plaintiff's injuries to the design of defendant's [product]" or "to any faulty feature thereof." 1996 WL 107111, at *2. Specifically, the court criticized the plaintiff for offering only experts that were not able or not qualified to show that the asserted defect in fact caused the injury. Id. "This Court draws a line between reasonable inferences on the one hand and scintillas of evidence and conjecture and surmise on the other." Id. Such is the case here.

The Sixth and Ninth Circuits reached similar conclusions on the issue of causation in cruise control cases. In Dupper, the Ninth Circuit found it dispositive that plaintiff had offered no evidence that the cruise control system was defective at the time it was purchased, that it was defective when the accident occurred, or that its wear characteristics made it likely to cause the accident

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[42] See supra, at note 39.

described. 1989 WL 123650, at **5. Second, the Ninth Circuit pointed out that the plaintiff's own testimony had not supported her expert's theory. Id. The Sixth Circuit case, Cole v. General Motors Corp., is even closer to being on point. There, [**62] the court held that "the sequence of events alleged by the plaintiffs was so unlikely that no reasonable juror could have possibly found a causal connection between the alleged defect, i.e., the absence of an on/off switch on the cruise control mechanism, and the injuries suffered by [the plaintiff] as a result of the accident." 1988 WL 76522, at **5.

c. Overwhelming Evidence

Alternatively, apart from the complete absence of evidence to support the jury verdict, there is such an overwhelming amount of evidence in favor of the defendant that reasonable and fair minded persons could not arrive at a verdict against it. *Galdieri-Ambrosini*, 136 F.3d at 289; *Kirsch,* 148 F.3d at 161. Ford, in addition to demonstrating essentially from plaintiff's own witnesses that the July 14, 1991 incident was not the result of plaintiff's sudden acceleration theory, also proffered an alternative scenario that was consistent with the evidence offered by third parties and received support from plaintiff's own witness Pope and the NHTSA governmental study. Ford's scenario was essentially as follows: Jarvis was unfamiliar with her brand new car, [**63] a minivan which was different from her previous low-riding car. Tr. 239-40. Under these circumstances, she started the car unaware that her father had set the parking brake (Tr. 280, 308), put her foot on the accelerator thinking it to be on the brake, and was startled when the engine started to race against the force of the parking brake. Continuing to believe that her foot was on the brake and not on the accelerator, plaintiff was unable to stop the car. This theory is supported by the following evidence:

(1) plaintiff's father's testimony that he set the parking brake (Tr. 308);

[*603] (2) plaintiff's own testimony that she saw the word "brake" lighted on the dashboard, which according to Pope means that the parking brake is set (Tr. 755-56);

(3) plaintiff's testimony that the speedometer was "going up" (Tr. 81) and read 30 to 35 m.p.h. (Tr. 278) or 40 to 45 m.p.h. (Tr. 279), which DeClercq testified was impossible if the ground wire was loose or disconnected since the ground wire for the amplifier and the speedometer are the same and the speedometer would have read zero (Tr. 1367-68);

(4) the testimony of eye witness Joanne Valentine-Simonian who witnessed the event while walking [**64] on the driveway and testified that she saw no rear brake lights illuminated on plaintiff's vehicle when it passed her (Tr. 425, 752); [43]

(5) the absence of skid marks in the gravel driveway (which would have supported plaintiff's claim that her foot was forcefully on the brake), as testified to by the investigating police officer who walked by the length of the driveway right after the accident looking for evidence (Tr. 91-92 749-50.);

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[43] As plaintiff's expert, Pope, and Ford's experts, DeClercq and Richard E. Keefer, explained, the rear brake lights would have been illuminated if plaintiff's foot was on the brake, as she testified. Tr. 706, 1163, 1352-58. [**65]

(6) Pope's testimony that Ford's scenario of plaintiff pumping the accelerator with the parking brake on would have resulted in the engine racing sound that plaintiff and Valentine-Simonian reported (Tr. 730-31);[44]

(7) Pope's testimony that the cessation of the revving sound that Valentine-Simonian described could have indicated that plaintiff had taken her foot off the accelerator (as if she were pumping the brakes), which would also explain the slowing of the vehicle (Tr. 756);[45]

(8) The testimony of Pope as well as other Ford witnesses that if plaintiff was pumping the brakes instead of the accelerator, the car would have stopped. Tr. 739-46, 1150, 1371-74.

The reasonableness of Ford's position was supported, both generally and in certain specifics, by a study conducted by the National Highway Traffic Safety Administration ("NHTSA"), a division of the United States Department of Transportation, which was introduced into evidence as defendant's Exhibit F-4, and relied on by both sides during the trial. In 1989, NHTSA

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[44] Keefer also testified that he had conducted experiments to establish this proposition. Tr. 1162-63

[45] An explanation Keefer also gave. Tr. 1163-64.

convened an independent panel [46] "to identify and evaluate factors which could potentially cause or contribute to the occurrence of 'Sudden Acceleration Incidents' (SAI)." In addition to convening the panel of independent experts, NHTSA also collected literature, case documentation, interviewed drivers, studied the fuel-systems, braking systems, and driving controls of the vehicles, received complete schematics for cruise control and other vehicle systems, and performed tests and experiments at NHTSA's Vehicle Research and Test Center. The panel selected ten vehicles about which [**66] there were numerous complaints (not including the Aerostar), noting that the specific vehicles chosen were representative of a much larger group.

The study reached a number of conclusions of particular relevance to the issues here. In connection with the panel's consideration [*604] of cruise control systems as a potential cause of SAI, the panel considered a Sero-like theory. [47] With respect to the likelihood of simultaneous, intermittent electrical failures occurring, the report concluded:

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[46] The curriculum vitae of all panel members are included in Appendix A to the Report. However, to convey the expertise of the panel, a few members are listed here: Dr. John B. Heywood, a Professor of Mechanical Engineering at the Massachusetts Institute of Technology ("M.I.T.") and the Director of the Sloan Automotive Laboratory at M.I.T.; Gary. L. Stecklein, Director Department of Vehicle Systems Research, Southwest Research Institute; and Dr. Phillip B. Sampson, Hunt Professor of Psychology, Tufts University.

[47] Apparently one of the vehicles studied by NHTSA, the Mercedes 300E, had a cruise control system that is always powered like the Aerostar.

> Extensive [**67] laboratory testing of the operation of cruise controls under stress from temperature extremes, power supply variations, EMI/FRI and high voltage discharges has demonstrated no failure modes of any relevance to SAI. Analysis of their circuitry shows that for nearly all controls designed in the past few years, two or more independent, intermittent failures would have to occur simultaneously to cause throttle opening in a way that would be difficult to detect after the incident. The occurrence of such simultaneous, undetectable failures is virtually impossible.

Ex. F-4 at vii. The report also states:

> While it is not extremely rare for an electronic part or solder joint to fail intermittently in a manner that is difficult to recognize or diagnose, the probability is extremely small for two or more parts or connections to fail simultaneously at exactly the right moment to cause an SAI, but then fail to do so during subsequent diagnostic tests.

Id. at 9. In rejecting cruise control faults as an explanation for SAI, the panel also relied on the fail-safe mechanical devises which disengage the cruise control when the brake pedal is depressed and the fact that simulated [**68] cruise control failures resulted in speeds that were "significantly less than those generated by drivers pressing their gas pedals to the floor." Id.

Acknowledging that there was a decrease in brake system effectiveness when a throttle was held wide-open, the NHTSA

panel conducted experimental studies to ascertain the distance a vehicle would travel "after simulated worst-case cruise-control-induced acceleration lasting two seconds [accounting for slower than usual braking reaction time], followed by brake-pedal application." Applying 60 pounds of pressure, the stopping distances ranged from 17.1 feet to 78.8 feet, considerably less than the 330 feet the Jarvis vehicle traveled. The panel also tested braking distances with wide open throttles and with closed throttles, applying the brakes from a standing start and applying 60 pounds of pressure. For front-wheel drive [**69] cars, there was relatively little disparity between open and closed throttle situations; however, for rear-wheel drive cars there was substantially greater disparity. [48] Id. at 19. Nonetheless, the maximum distance for any vehicle was 120 feet. Indeed, the panel concluded: "for most SAI, the most plausible cause of an open throttle condition while attempting to brake is pedal misapplication, which is likely to be perceived as brake failure." Id. at ix.

Similarly, the NHTSA panel found that the wide open throttle "with apparent brake-failure condition characteristic of SAI almost always requires a pedal misapplication." Id. at 42. Apart from having [**70] eliminated other mechanical and electrical causes, the study relied on the fact that almost none of the incidents involved cars with manual transmissions, which require proper alignment of the pedals to put the car in motion. The

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[48] There was reliance by plaintiff on a reference in the NHTSA report to the effect that 175 to 200 pounds of pressure might be necessary to stop a vehicle under a wide open throttle condition. That reference was to test results involving efforts to stop high-powered, rear-wheel drive cars going in reverse. That is not the factual situation in Jarvis.

panel also found that most of the vehicles with high reports of SAI were inter alia configured in a fashion that permitted simultaneous application of the brake and accelerator or had brakes with a soft feel that made it harder for a driver to realize that his or her foot was on the wrong pedal. In addition, the panel noted that "review of the data recently gathered by NHTSA reveals that the rate [*605] of complaints about unwanted engine power fall off precipitously with vehicle mileage, suggesting that familiarity is strongly related to complaint rate. Id. at 38. Further, if a "SAI is initiated by a pedal misapplication of which the driver is unaware, loss of control can occur." Id. at vii. Finally, the report detailed hypotheses, offered by human factors psychologists "to explain how sober, honest drivers" incorrectly believed that they had not pressed the wrong pedal. Id. at 42. NHTSA made a number of recommendations concerning the configuration [**71] of the brake and accelerator pedals and the installation of shift-locks in cars with automatic transmissions. [49] The NHTSA panel did not suggest any alteration in wiring designs of cars, nor did they endorse the alternate design Sero proposed, an additional on/off switch for the cruise control.

In short, Ford offered a theory that accounted for the objective facts and received support from plaintiff's own expert and the NHTSA study. See *American & Foreign Insurance Co. v. General Electric Co.*, 45 F.3d 135, 140 (6th Cir. 1995) ("where the evidence indicates that it is as likely that the incident was caused by factors other than those asserted, a verdict for the defendant is mandated since otherwise a verdict would be based

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[49] Shift-locks require the driver to apply the brakes in order to put the vehicle in gear.

on speculation and conjecture"). Thus, for the reasons set forth, Ford's motion for judgment pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is granted.

III. Defendant's [**72] Motion to Reduce the Verdict

Although not necessary to our holding, for the sake of completeness we will decide defendant's motions to reduce the verdict and dismiss plaintiff's punitive damages claim. With respect to defendant's motion to reduce the verdict, New York's collateral source rule is contained in CPLR § 4545(c) and provides that:

> In any action brought to recover damages for personal injury ... where plaintiff seeks to recover for ... loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified in whole or in part from any collateral source such as insurance [or] ... social security ... If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding ...

"The burden is on the defendant to prove that a plaintiff's award should be reduced by payments received from collateral sources." *Damiano v. Exide Corp.*, 970 F. Supp. 222, 229 (S.D.N.Y. 1997) [**73] (citations omitted).

At trial, plaintiff's own expert witness, Dr. Matityahu Marcus, testified that plaintiff has received a total of $ 94,194 in past social security payments and that the present value of her future

payments totals $ 170,750. Dr. Marcus also testified that plaintiff has received a total of $ 91,760 in past payments from a private disability policy and the present value of her future payments from the disability policy totals $ 116,765. Thus, in sum, Dr. Marcus testified that plaintiff has received or will receive a total of $ 473,469 in collateral source payments.

Plaintiff attempts to disavow its own expert's testimony, calling it "speculative." Pl. 4545 Mem. at 3. Plaintiff argues that "there is absolutely no evidence before the Court as to the basis for the payments, how long they will continue, the precise amounts of the payments and, most importantly, what the payments are intended to replace, if anything." Id. Plaintiff does not offer any specific information about which calculations performed by its expert may be erroneous. Instead, plaintiff alternatively argues that the Court should hold an evidentiary hearing on the collateral source issue. Id. [**74] at 5-6.

[*606] An evidentiary hearing is unnecessary because, based on Dr. Marcus' testimony, we find that it is reasonably certain that plaintiff has received the collateral source payments calculated by Dr. Marcus and that she will continue to receive these payments in the future. Plaintiff has submitted no information that refutes the calculations made by her own expert, and there is no reason for the Court to doubt Dr. Marcus' testimony. Further, plaintiff's argument that she may not continue to receive benefits in the future is refuted by the testimony of her own doctors, who opined that she is permanently disabled, and any speculation that plaintiff may be able to work in the future cannot serve as a basis for finding that current collateral sources will no longer be available. See *Corbin v. Grand Union Co.*, 1997 U.S. Dist. LEXIS 18821, No. 96 Civ. 4626, 1997 WL 739583, at *9 (S.D.N.Y. Nov. 26, 1997) (citing *Frey v. Chester E. Smith & Sons, Inc.*, 751 F. Supp. 1052, 1056 (N.D.N.Y. 1990)).

IV. Defendant's Motion to Dismiss Claim for Punitive Damages

Under New York State law, punitive damages are available against parties whose acts or omissions amount to willful or wanton [**75] conduct "which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." *Home Insurance Co. v. American Home Products Corp.*, 75 N.Y.2d 196, 203-04, 551 N.Y.S.2d 481, 485-86, 550 N.E.2d 930, 934-35 (1990). "Punitive damages [are] available only where [the] defendant acts with evil and reprehensible motives." *Wallach Marine Corp. v. Donzi Marine Corp.*, 675 F. Supp. 838, 842 (S.D.N.Y. 1987). The Second Circuit has held that the recklessness that will give rise to punitive damages "must be close to criminality" and like criminal behavior, must be "clearly established." *Roginsky v. Richardson-Merrell*, Inc., 378 F.2d 832, 843 (2d Cir. 1967) (citations omitted).

Plaintiff submits that the Updegrove Report, Ford "Hotline" [50] reports, and a warning in Ford's Parts and Service Division Manual supports its assertion that Ford acted with conscious disregard of the rights of others. Pl. Punitives Reply at 2. There is nothing in any of these exhibits [51] that supports plaintiff's claim that defendant's actions meet this exacting standard of

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[50] See Jarvis, 1999 WL 461813, at *7 n.17 for a description of Ford's Hotline reports

[51] In reaching this result on the punitive damages motion, we do not rest on the fact that plaintiff's efforts to introduce the "Hotline" reports and the service manual into evidence at trial were rejected as we are familiar with both documents from the pretrial phase of the case.

moral culpability. While this evidence establishes [**76] that Ford was aware of, or at least concerned about, the potential for a sudden acceleration event, it does not establish that Ford consciously disregarded the risk. Rather, it shows that Ford affirmatively attempted to carefully monitor such complaints, albeit that Ford did not reach a conclusion consistent with plaintiff's theory herein.

In reaching our conclusion that Ford may not be held liable for punitive damages, we also rely on the fact that NHTSA, employing a blue ribbon panel, rejected the equivalent of plaintiff's theory and did not recommend any changes to cruise control systems like Ford's. NHTSA concluded: [**77]

> For SAI [Sudden Acceleration Incidents] in which there is no evidence of throttle sticking or cruise control malfunction, the inescapable conclusion is that these definitely involve the driver inadvertently pressing the accelerator instead of or in addition to the brake pedal.

Tr. 1243. Accordingly, defendant's motion is granted and plaintiff's claim for punitive damages is dismissed.

CONCLUSION

When called upon to do so, a court must address whether a party has met its burden [*607] to survive a motion for judgment as a matter of law with reference to the evidence adduced at trial and the record as a whole. *Pahuta v. Massey-Ferguson*, 170 F.3d 125, 130 (2d Cir. 1999). Our review of the evidence presented in this trial leads us to the conclusion that there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of

sheer surmise and conjecture. *In Re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d at 1131. For the reasons stated above, defendant's motion for judgment as a matter of law is granted and the plaintiff's case is, accordingly, dismissed. In addition, [**78] this court makes the following rulings for the sake of completeness: defendant's motions to reduce the verdict and to dismiss plaintiff's claim for punitive damages are granted.

DATED: New York, New York

October 27, 1999

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the Second Circuit
United States Court House
40 Foley Square
New York New York 10008

Roseann B. Mackechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the Day of June two thousand two.

KATHLEEN MADALINE JARVIS
Plaintiff-Appellant,

v. Dkt No: 99-9405

FORD MOTOR COMPANY,
Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Ford Motor Company.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no

such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: S/_____

Arthur M. Heller,
Administrative Attorney

AMENDMENT VII - CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV - CITIZENSHIP, PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an

objection does not thereafter prejudice the party.

RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

(a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered

pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(2)
Supreme Court U.S.
FILED
OCT 11 2002
OFFICE OF THE CLERK

Docket No. 02-406

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

KATHLEEN MADALINE JARVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

Neither the decision of the court below nor the Petition present any justiciable issue warranting review by the Court, and accordingly, the Petition should be denied.

REASONS FOR DENYING THE PETITION

1. The Petition states in the preamble to the "Questions Presented" that:

> This case arises in the context of a confusing and unsettled area of federal law, to wit, the correct procedures to be followed by the courts and parties in the event that a jury renders an inconsistent verdict.[1]

The "inconsistent verdict" house of cards created by Petitioner, in a contrived effort to present justiciable issues warranting review by the Court collapses under its own weight in the face of the record of the trial of this case and the disposition of Petitioner's arguments, premised upon Rules 49 and 51,[2] by the Court of Appeals below.

Fact of Record. The jury verdict was not inconsistent in any respect. The verdict was precisely responsive to the *agreed* jury instructions, which stated:

> plaintiff brings this action on the basis of two theories of liability: Negligence and strict liability . . . .
>
> If you find that the cruise control system in the Aerostar was not defective and that Ford was not negligent, you will not reach the issues raised in the remainder of the charge.

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1 Petition at i.

2 FED. R. CIV. P. 49 and 51.

> If, however, you find either that Ford was negligent in the design of the 1991 Aerostar cruise control system, or that the 1991 Aerostar cruise control system was itself defective, you must next consider whether that negligence or defect was a substantial factor in causing plaintiff's injury . . . . If you find that neither the defendant's negligence nor the cruise control defect was a substantial factor in causing the injury, then plaintiff may not recover.
>
> If you find that either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you will proceed to consider comparative fault . . . .
>
> If you find either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you must next consider whether the plaintiff was also negligent.[3]

Fact of Record. Petitioner Ford did not voice any objection to the jury instructions until *after* the jury returned its verdict finding for Petitioner Ford on the defect claim, but for Respondent Jarvis on the negligence claim.

Fact of Record. The verdict of the jury was directly responsive to the agreed verdict form. Petitioner Ford *agreed* to the form of verdict submitted to the jury. The jury verdict form,[4] although entitled "Special Verdict Questions," called for a general verdict in response to special questions addressing both liability theories (strict product liability and negligence) on the basis of which the case was tried by the parties.

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[3] Jarvis v. Ford Motor Co., 283 F.3d 33, 54-55 (2d Cir. 2002). *See* Appendix to the Petition at 35a-36a (hereinafter "Pet. App.").

[4] *See* Pet. App. at 69a-73a.

Fact of Record. There is no inconsistency in the jury verdict finding no strict product liability but finding negligence on the part of Petitioner Ford. The jury findings in both respects were directly responsive to the trial court's agreed jury instructions and the agreed jury verdict form.

2. Petitioner then characterizes this case as presenting:

> the Court with the opportunity to resolve a long festering conflict among the courts of appeals, not only as to proper procedures to be followed by district courts and parties in the event that a jury renders an inconsistent verdict . . . .[5]

Nowhere in the Petition is there any reference, however, to any decision of any Court of Appeals in conflict with the decision of the court below in this case, in any respect. The Petition strives to create a "conflict" for resolution by the Court where none exists.

With respect to Rule 51, the court below held that Petitioner Ford had waived any objection to the jury verdict in response to the trial court's instructions by not raising the objections before the jury retired to deliberate, as strictly required by Rule 51. The court below even gave Petitioner Ford a post-argument opportunity to demonstrate where, in the trial record or anywhere outside of the record, Ford had preserved its objection pursuant to Rule 51.[6] Upon the basis of the record and the post argument submission by Ford, the court below held that:

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5 Petition at 1.

6 *See* United States Court of Appeals for the Second Circuit Order for Supplemental Letter Briefs annexed herewith at Appendix "A".

> under the principles of Rule 51, Ford had waived its objection to verdict inconsistency.[7]

In rejecting Ford's inconsistent verdict arguments based upon Rule 49, the court below held that Rule 49:

> is inapplicable here because the alleged inconsistency [in the jury's verdict] was not among responses to interrogatories regarding "issues of fact," but between two general verdicts based on different legal theories.[8]

The court below held further that a motion under Rule 49:

> cannot, as a matter of law, provide any relief for a party challenging a conflict between general verdicts based on an instruction given in the jury charge and repeated on the verdict sheet.[9]

The court below also declined to "shoehorn this case into Rule 49 in order to avoid" the result of Ford's waiver of its objection to verdict inconsistency under the principles of Rule 51.

The court below succinctly summed up the situation sought to be fashioned by Ford:

> In this ten-year litigation, the issue of the jury charge was litigated extensively. Ford asked for this jury charge, presumably for strategic reasons, and was well apprised of the law of waiver. To excuse Ford from the well-established rules of waiver

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7 *Jarvis*, 283 F.3d at 62; Pet. App. at 51a.

8 *Jarvis*, 283 F.3d at 56; Pet. App. at 39a-40a.

9 *Jarvis*, 283 F.3d at 56; Pet. App. at 40a.

> would permit precisely the sort of "sandbagging" that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve.[10]

The Petition presents no conflict, arising from the disposition by the court below of Ford's arguments premised upon Rules 49 and 51, with any decision of any other Court of Appeals. In an effort to gain the attention of the Court, the Petition seeks to create jury trial constitutional issues, which clearly do not arise from or exist in the decision of the court below.

This Petition, like hundreds of others before, is the last foray in Ford's attempt to deprive Respondent Jarvis of justice.

The Petition, like thousands of others before, should be denied as not warranting review by the Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
October 10, 2002

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[10] *Jarvis*, 283 F.3d at 62; Pet. App. at 51a.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FILED May 24, 2001
No: 99-9405(L)
00-9215 (CON)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of May two thousand and one,

Present:

HON. JAMES L. OAKES,
HON. ELLSWORTH A. VANGRAAFEILAND,
HON. SONIA SOTOMAYOR,
Circuit Judges.

KATHLEEN MADALINE JARVIS, Individually and as a parent and guardian of Paul Michael Attila Jarvis, a minor,

Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,

Defendant-Appellee.

IT IS HEREBY ORDERED:

That the parties file supplemental letter briefs of no more than two pages in length as follows:

Counsel for appellee Ford Motor Company is ordered to submit a letter brief and any attachments by Thursday May 31, 2001at 5 p.m., and counsel for appellant Kathleen Madaline Jarvis is ordered to respond by letter brief and any attachments by Thursday June 7, 2001 at 5 p.m. providing the following information:

The district court's October 27, 1999 opinion explains that at a July 12, 1999 Pre-Trial Conference "and times previous to the conference, defense counsel made it clear that they believed the case should have gone to the jury on either a negligence or strict liability theory, but not both." *Jarvis v. Ford Motor Co.*, 69 F. Supp. 2d 582, 588-89 (S.D.N.Y. 1999). The district court also notes that "[t]he dual charge issue had been raised in an exchange of correspondence with the Court pretrial." *Id.* at 589 n.12.

The parties are directed to supply this Court with the page numbers of the Joint Appendix at which are found the record of any objections made before the jury was charged to both theories of liability—negligence and strict liability—being presented to the jury. The record of any such objections may include the transcript of conferences with the district court, letters submitted to the district court, or any other evidence of these objections. If evidence of such objections exists outside of the documents contained in the Joint Appendix, the parties are requested to append a copy of these additional documents to their letter briefs and provide in their letters briefs a short explanation of the source of these documents, how their contents came to be considered by the district court, and any

other information that may be necessary to understand their content.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ LUCILLE CARR
Lucille Carr

(3)

Supreme Court, U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

No. : 02-406

In the

Supreme Court of the United States

October Term, 2002

FORD MOTOR COMPANY,

Petitioner,

v.

KATHLEEN MADALINE JARVIS,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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10 pp

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Fed.R.Civ.P. 49

Fed.R.Civ.P. 51

PETITIONER'S REPLY MEMORANDUM

In her opposition respondent does not dispute that the momentous issues presented in Ford Motor Company's (Ford") petition merit review by this Court. Indeed, by her silence respondent concedes that conflict and confusion reign in this area of federal law and procedure. Instead, via a tortured distraction, respondent attempts to position this case outside the conceded decisional chaos about inconsistent verdicts, hoping to avoid the Court's review. Respondent's avoidance strategy consists of two gambits. Both fail utterly. Thus, respondent first argues, incredibly, that the verdict in this case was not inconsistent. But, respondent's argument is contrary to the holding of the circuit court here, to the holding of the district court here, to the law of the case as set forth in the instructions to the jury in this case, and to basic principles of the law of products liability.

Second, respondent argues that since the Rule 49(a) special verdict everyone dealt with at trial was later found by the panel majority to constitute, instead, two "general verdicts," purportedly to be governed retrospectively by Rule 51, this case thereby falls outside the circuit court fray described in Ford's petition. But this contention only begs the pivotal questions. Should or can the circuit court properly invent two "general verdicts" for one cause of action under the Rule 49(a) circumstances applicable here? By what authority under the federal rules of civil procedure can it do so? Can a waiver under purported Rule 51 be imposed retrospectively here? and others. This case does not lie outside the circuit court arena of conflict. It is squarely within. It epitomizes the tensions. Indeed, it aggravates them, as we now show.

A. Verdicts Inconsistent Under the Jury Instructions.

While, at respondent's insistence, the jury was permitted to consider both the negligence and strict products liability claims, contrary to respondent's opposition, the charge here did *not* permit the jury to find negligence without also finding a defect. Instead, the charge, which both respondent and petitioner requested, made clear that the jury could *not* find Ford negligent if it found that the product was not defective. Respondent's quoted excerpts from the jury charge are grossly incomplete. The omitted portion is fatal to respondent's main argument. (A copy of the jury instructions with regard to strict products liability and negligence is annexed hereto as an Appendix). The instructions on negligence specifically provided that:

> *If, however, you find that the product was not defective when put on the market by Ford*, or that in its defective condition the 1991 Aerostar was not reasonably certain to be dangerous when put to normal use, or that Ford used reasonable care in designing, inspecting and testing the cruise control system in the 1991 Aerostar and had no knowledge of the defect when the product was put on the market, *you will find that Ford was not negligent*. (Emphasis added, Appendix, *infra*, p. 5a).

The district court's subsequent instruction permitting the jury to consider the damages issue if they found either negligence or defect, did not eliminate respondent's need to prove each element of the negligence claim which, according to the jury instructions in this case, required finding the existence of a defect.

In the face of this unequivocal language in the charge,

any claim that the verdicts were not inconsistent simply cannot be sustained. Indeed, both the district court (Appendix B to the petition, pp. 78a-84a), and circuit court (Appendix A to the petition, pp. 35a-46a) ruled that the verdicts in this case were inconsistent. That determination was premised on New York law of strict products liability which has recognized that negligence and strict products liability are "functionally synonymous". *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 257-58 (1995). The point of departure between the circuit court and district court was with regard to the appropriate procedures to be followed by the parties and court when confronted with an inconsistent verdict, *precisely the issue presented for review in Ford's petition*. Indeed, the very essence of the panel majority's decision is Ford's purported waiver of the inconsistency by not objecting under Rule 51 rather than Rule 49 – a waiver issue the circuit court plainly need not have decided if no inconsistency existed.

B. Rule 51 Holding Aggravates Circuit Court Conflict

Disregarding the provisions of Fed.R.Civ.P. 49 ("Rule 49"), which sets forth the procedures to be followed in the event that a jury renders findings which are inconsistent, and ignoring the verdict sheet itself which is entitled "Special Verdict Questions" and which asks the jury to "find" on multiple factual issues,[1] the assertions of *both respondent and petitioner* that this case is governed by Rule 49, and the holding by the district court that Rule 49 applied, the second circuit majority nevertheless concluded that the verdict in this case was

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[1] Rule 49(a) explicitly refers to a "special verdict" and to "findings" of the jury on factual issues — language expressly used in the verdict sheet here, clearly evidencing the intent of all concerned. See Appendix A to petition at pp. 69a-73a.

not a special verdict but rather consisted of two general verdicts. Because the federal rules do not recognize or provide for the use of more than one general verdict in one cause of action, and do not set forth a procedure to follow in the event that a jury should issue conflicting general verdicts, the second circuit created its own rules and procedures and applied them retrospectively to the parties in this case to create a waiver where none existed or was intended. See Petition at pp. 23-25.

Contrary to respondent's assertion, the fact that the circuit court cited to Fed.R.Civ.P. 51,[2] a rule which governs the need to object to jury charges (as opposed to verdicts), as support for its unprecedented procedures, does not take this case out of the web of conflict which admittedly surrounds Rule 49. Rather, the panel majority's post-hoc creation of a Rule 51 procedure to deal with its newly-minted "two general verdicts" invention entangles the case even further into the web by exacerbating the conflict. Thus, respondent's assertion that "nowhere in the Petition is there any reference, however, to any decision of any Court of Appeals in conflict with the decision of the court below in this case, in any respect" (respondent's opposition, p.3), is incredible. It ignores the fact that other circuit courts, when presented with a verdict sheet like the one used in this case, deemed the resulting verdict a "special verdict" governed by Rule 49 (see cases cited in the petition at

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[2] While respondent blithely and opportunistically categorizes this case as one governed by Rule 51 (respondent's opposition, pp. 3-5), respondent failed to cite Rule 51 in her submission to the district court or in either of her briefs to the second circuit. This further undermines any suggestion that Rule 49 does not apply and is not at issue here, and precludes respondent from relying on this argument to avoid review by this court.

p. 23), and the fact that, at the time the Petition was filed,[3] no other circuit had recognized that two general verdicts could be rendered in one cause of action (Appendix A to petition, pp. 55a-60a).

C. Conflict in the Circuit Courts Should be Resolved.

In fact, this case is the perfect vehicle for resolving the massive conflict in the federal courts with regard to inconsistent verdicts because it will give the Court an opportunity to address any or each facet of the controversy, from the creation of the verdict sheet to the preservation of error to the resolution of the dilemma created when a court is confronted with inconsistent verdicts. This case presents basic core issues ubiquitously found in federal trial practice and which supposedly are to be governed by uniformly applied federal rules of civil procedure. As shown in the petition, these issues arise either as a cause or as a result of the conflict that exists among the circuit courts in this area of practice. That they are properly presented here is evidenced by the conflict between the majority and the dissent. The Court's resolution of any, several or all of these following issues, clearly presented in this case, would help dissipate conflict and provide much needed guidance to the trial bench and bar and to divided circuit courts.

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[3] Since this petition was filed, the eleventh circuit, in *Mason v. Ford Motor Company*, 2002 U.S. App. LEXIS 20200 (11th Cir. 2002), citing the circuit court's opinion in this case, deemed the inconsistent verdict sheet at issue in *Mason* as one which provided two general verdicts, but declined to apply Fed.R.Civ.P. 51 to determine the procedures applicable and created its own procedures instead. *Mason* underscores the need to grant certiorari here before more mischief ensues on so cardinal a question as "what is a general verdict?" and before an already confused area of practice becomes hopelessly so.

1. What is a general verdict and can there be more than one general verdict for one cause of action? (See, petition pp. 19-23, contrast majority opinion, Appendix A, pp. 35a-40a, with dissenting opinion at pp. 57a-60a);

2. What is a "special verdict" under Rule 49(a) and what is a "general verdict accompanied by interrogatories" under Rule 49(b)? (See cases cited at pp. 18-19 of the petition, contrast majority opinion, Appendix A, pp. 38a-40a, with dissenting opinion at pp. 60a-67a,);

3. Who determines the nature of a verdict, the district court, the parties or the circuit court, and what is the standard of appellate review for such determinations? (See cases cited at p. 21 of the petition, contrast majority opinion, Appendix A, p. 46a, with dissenting opinion at pp. 67a-68a);

4. How is a claim that a verdict is inconsistent preserved and what is the interplay, if any, between Rule 49, Rule 51 and Rule 46? (See cases cited at pp. 17-18 of the petition, contrast majority opinion, Appendix A, pp. 40a-51a, with dissenting opinion at pp. 61a-62a, 67a-68a);

5. Who determines whether a waiver of an inconsistency took place, the district court or the circuit court and what standard of appellate review applies? (See petition at p. 23, contrast majority opinion, Appendix A, p. 46a, with dissenting opinion at pp. 65a-66a).

6. What is the effect of a purported waiver, does it vitiate the inconsistency and permit entry of judgment? (See cases cited at pp. 11-13 of the petition, contrast majority opinion, Appendix A, pp. 46a-51a, with

dissenting opinion at pp. 62a-64a); and,

7. What is the appropriate relief to be granted in the event that the jury renders an inconsistent verdict, i.e., should the issues be resubmitted to the jury, should the matter be set down for a new trial, or should judgment be entered? (See cases cited at pp. 11-13 of the petition, contrast majority opinion, Appendix A, pp.51a-54a, with dissenting opinion at pp. 60a-67a).

As Ford demonstrated in its petition and respondent appears to concede, there is a recurring conflict among the circuits as to virtually each and every one of these fundamental issues.[4] These are not esoteric issues which are unlikely to arise or which will not impact on the rights of the parties. Rather they are issues which go to the core of the right to trial by jury as guaranteed by the Seventh Amendment. For example, how can so basic and cardinal a question as "what is a general verdict" or "what is a special verdict" engender such confusion

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[4] Indeed, since the decision of the panel majority here, at least five other circuit courts have issued decisions addressing one or the other of these issues with disparate results. See, *e.g.*, *Mason v. Ford Motor Co.*, 2002 U.S. App. LEXIS 20200 (11th Cir. 2002) (where jury renders two inconsistent general verdicts failure to object before jury is discharged constitutes waiver); *Babcock v. General Motors Corp.*, 299 F.3d 60 (1st Cir. 2002) (objection to jury instructions before deliberations begin insufficient to preserve claim of inconsistent verdict - objection must be raised after verdict is rendered and before jury is discharged); *Watkins v. City of San Diego*, 2002 U.S. App. LEXIS 10220 (9th Cir. 2002) (no inconsistency can be claimed if issue was not properly framed on the verdict form); *McHugh v. Olympia Entertainment, Inc.*, 2002 U.S. App. LEXIS 10312 (6th Cir. 2002) ("we should be deferential to the determination of inconsistency made by a district judge"); *3M v. Chemque, Inc.*, 303 F.2d 1294 (Fed. Cir. 2002) (argument at district court that verdicts could be reconciled precludes argument on appeal that verdicts were inconsistent).

and discord? These issues are essential to application of Rules 49(a) and 49(b). Or for example, here, Ford was retrospectively deemed to have waived its constitutional right to enforcement of the jury verdict of "no defect", despite Ford's compliance with the provisions of the rules deemed applicable by the parties and actually applied by the district court, and despite the fact that no waiver was intended or contemplated by the parties or the trial court. Such unjust, unintended waivers will continue to occur unless the issues presented by this petition are resolved and uniform procedures are put into place to govern disposition of inconsistent verdicts. Only this Court can clarify how the uniform system of practice envisioned by adoption of the federal rules of civil procedure extends to the realm of inconsistent verdicts. This case is apt for this Court's review.

Respectfully submitted,

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not true -- then that element will have been proved by a preponderance of the evidence.

The standard described refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal case. That requirement does not apply to a civil case such as this, and you should put it out of your mind.

Plaintiff bears the burden of proof on most of the issues involved in this case, and defendant bears the burden of proof on one issue. So, unless I note otherwise, plaintiff bears the burden of proof.

Plaintiff brings this action on the basis of two theories of liability: Negligence and strict liability. The two causes of action are similar, so let me first explain to you the difference, because it is important so that you can distinguish the two.

In determining whether the defendant was negligent, your focus should be on whether or not the defendant knew or should have known -- sorry, that's a mistake. Let me start that again.

In determining whether the defendant was negligent, your focus should be on whether the defendant knew of some

foreseeable harm arising from the use of the product. In contrast, in determining the issue of strict liability, your focus should not be on the defendant's conduct or knowledge, but on the way the product is designed - -

Let me start that again, sorry.

In contrast, in determining the issue of strict liability, your focus should not be on the defendant's conduct or negligence, but on whether the product, as designed, was effective.

Put another way, the negligence claim raises the question of whether Ford acted reasonably in selecting the design for the 1991 Aerostar cruise control system, whereas the strict liability claim focuses on the question of whether the cruise control system itself was unreasonably dangerous. I will charge you first on the strict liability claim.

A manufacturer who sells a product in a defective condition is liable for injury which results from use of the product when the product is used for its intended or reasonably foreseeable purpose.

A product is defective if it is not reasonably safe, that is, if the product as designed is so likely to be harmful to persons ox property that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed as designed. It is not necessary to find that the manufacturer knew or should have known of a product's potential for causing injury in order to determine that it was not reasonably safe. It is sufficient that a reasonable person who did in fact know of the design's potential for

causing injury and of the available alternative designs would have concluded that the product should not have been marketed in that condition. The conclusion should be based upon a balancing of the risks, if any, and usefulness of a product as against the risks, if any, usefulness, and additional costs of an alternative design.

The plaintiff has the' burden of proving that the design of the cruise control system was not reasonably safe. You must decide whether the design of the cruise control system of the 1991 Aerostar considered in its entirety was defective. For purposes of this case, you should consider the cruise control system along with the throttle body and the braking system. I will not repeat that description, but you should keep it in mind when I refer to the cruise control system. Stated generally, plaintiff claims that the cruise control was defectively designed because the servo received electrical current as soon as the ignition was turned on, thus permitting simultaneous random electrical events to result in a wide open throttle condition.

Plaintiff also claims that the cruise control system was defective in design in that it contained no failsafe mechanism. Specifically, plaintiff maintains that the braking system, including the dump valve, was not a sufficient safety device. Ford, on the other hand, basically maintains that there was no defect in the cruise control system, because the simultaneous random electrical events posited by plaintiff's witness, Samuel Sero, are highly unlikely to occur, and further, even assuming that the Aerostar van experienced an unwanted sudden acceleration, application of the brakes would open the dump valve and would turn the throttle to idle. In determining whether the cruise control system in plaintiff's 1991 Ford Aerostar was or was not reasonably safe as designed, you should weigh all

the evidence and balance the risks of this design against its utility.

In balancing the cruise control risks against its utility, you may, but are not limited to or required to consider the following factors:

1. The likelihood that the cruise control system as designed will cause injury;
2. The utility cruise control to the public as a whole and to the individual user;
3. The technological and economic feasibility of safer design;
4. The plaintiff's awareness of the danger and ability to have avoided the injury by careful operation of the vehicle; and
5. Ford's ability to spread the cost of any safety related design changes.

After weighing the evidence and balancing the cruise control system's risks against its utility, you will decide whether the cruise control system of plaintiff's 1991 Aerostar was or was not reasonably safe as it was designed. If you conclude that the cruise control system was reasonably safe as designed, you will find that it was not defective. If you conclude that it was not reasonably safe as designed, then it was defective.

A manufacturer of a product which is reasonably certain to be dangerous if defectively made -- I'm sorry.

A manufacturer of a product which is reasonably certain to be dangerous if defectively made, owes a duty to use reasonable care in the manufacture of a product, so that it will

be reasonably safe for its normal uses. Reasonable care means that degree of care which a reasonably prudent manufacturer of such a product would use in the design of the product and the materials and parts of which it is made in order to produce a reasonably safe product.

If you find that the cruise control system in the 1991 Aerostar, which plaintiff claims caused her injury, was defective when put on the market by Ford Motor Company, that with such a defect, the vehicle was reasonably certain to be dangerous when put to normal use, that Ford failed to use reasonable care in designing the cruise control system or in inspecting it or testing it for defects, or that even though Ford used reasonable care in designing, inspecting and testing the cruise control system in the 1991 Aerostar, that Ford learned of the defect before putting the product on the market and did nothing about it, you will find that Ford was negligent. If, however, you find that the product was not defective when put on the market by Ford, or that in its defective condition the 1991 Aerostar was not reasonably certain to be dangerous when put to normal use, or that Ford used reasonable care in designing, inspecting and testing is cruise control system in the 1991 Aerostar and had no knowledge of the defect when the product was put on the market, you will find that Ford was not negligent.

If you find that the cruise control system in the Aerostar was not defective and that Ford was not negligent, you will not reach the issues raised in the remainder of the charge.

If, however, you find either that Ford was negligent in the design of the 1991 Aerostar cruise control system, or that the 1991 Aerostar cruise control system was itself defective,

CHARGE

you must next consider whether that negligence or defect was a substantial factor in causing plaintiff's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as the cause of the injury. If you find that neither defendant's negligence nor the cruise control defect was a substantial factor in causing the injury, then plaintiff may not recover.

If you find that either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you will proceed to consider comparative fault. Only after that will you determine the question of damages.

If you find either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you must next consider whether the plaintiff was also negligent, and whether plaintiff's conduct was also a substantial factor in causing the accident.

To determine whether plaintiff was negligent, you should determine whether plaintiff took or failed to take actions that a reasonably prudent person would have taken under the circumstances.

You should also apply the same definition of substantial factor discussed earlier, that is, would a reasonable person regard plaintiff's negligence, if any existed, as a cause of the injury. In doing so, you should